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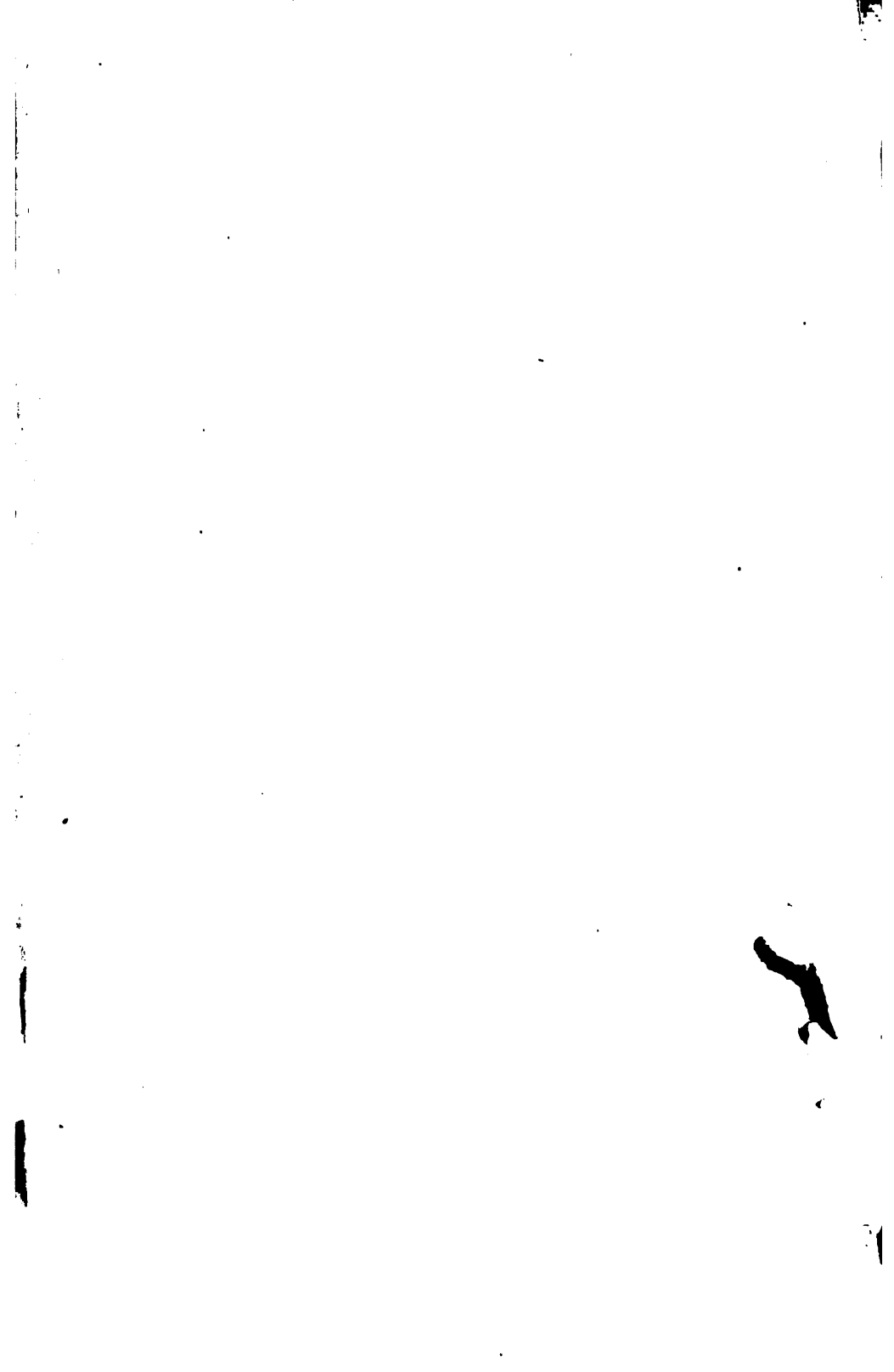
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17  
REPORTS OF CASES

IN THE

2  
SUPREME COURT OF NEBRASKA.

JANUARY TERM, 1904.

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VOLUME LXXI.

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HARRY C. LINDSAY,  
OFFICIAL REPORTER.

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PREPARED AND EDITED BY  
HENRY P. STODDART,  
DEPUTY REPORTER.

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BY HARRY C. LINDSAY, REPORTER OF THE SUPREME COURT,  
In behalf of the people of Nebraska.

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*Rec. May 8, 1907*

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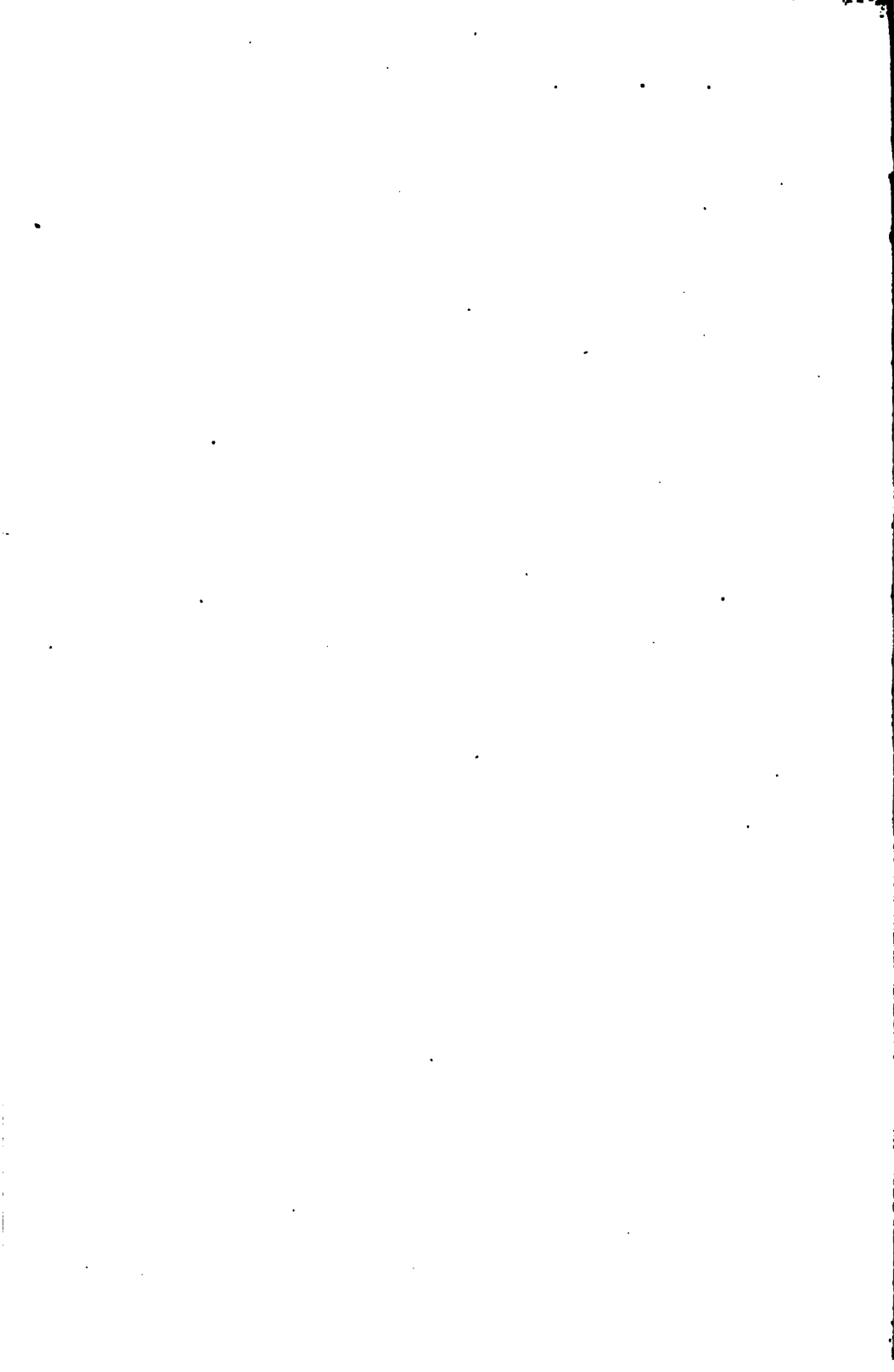
UNITED STATES.

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CASES DETERMINED  
IN THE  
SUPREME COURT OF NEBRASKA  
AT  
JANUARY TERM, 1904.

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STATE OF NEBRASKA, EX REL. CHARLES W. YOUNG, v. EDWARD ROYSE, MAYOR OF THE CITY OF BROKEN BOW, ET AL.\*

FILED FEBRUARY 4, 1904. No. 11,877.

1. **Statutes: CONSTRUCTION.** Statutes *in pari materia* should be construed together and, if possible, effect given to all of their provisions. *Dawson County v. Clark*, 58 Neb. 756.
2. **Municipalities: JUDGMENT: MANDAMUS.** The levy of a tax under the provisions of sections 1 to 5 inclusive of article VI, chapter 77, Compiled Statutes, with which to satisfy a judgment against a county, school district, or municipality, will not be enforced by a writ of mandamus where such proposed levy is in excess of constitutional or statutory limitations.
3. ———: **WATER SUPPLY: TAX LEVY: LIMITATION.** The provisions of subdivision 15, section 69, article I, chapter 14, Compiled Statutes, 1887, empowering cities of less than 5,000 population and villages, to levy a tax of not exceeding 7 mills on the dollar valuation, for hydrant rentals or water furnished such city or village under contract, is a limitation on the taxing power to raise revenue to satisfy an indebtedness created for such purposes.
4. **Judgment Against Municipality.** A judgment against a municipality has the effect only of an audited claim or demand. It establishes the amount legally due, but gives no new right in respect of the means of payment; and, in an action to compel the levying of a tax to satisfy such judgment, a court will look behind the judgment and ascertain the nature and character of the

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\* See former opinions, 3 Neb. (Unof.) 262 and 269.

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State v. Royse.

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indebtedness on which it is based, in order to determine the limit of the tax which may be levied for its satisfaction.

5. —: TAX LEVY: LIMITATION. Where judgments have been obtained against a city of less than 5,000 population, for hydrant rentals, by a water works company operating under an ordinance and statute limiting a levy of tax for such purposes to a rate not exceeding 7 mills on the dollar valuation, and such tax has been levied, collected, and applied for such purposes each and every year during the existence of the contract, the court will not compel an additional levy in excess of the statutory limitation for the satisfaction of such judgments.

ERROR to the district court for Custer county: HOMER N. SULLIVAN, JUDGE. *Rehearing denied.*

*O'Neill & Gilbert*, for plaintiff in error.

*C. L. Gutterson and A. R. Humphrey*, contra.

HOLCOMB, C. J.

The relator, by means of the writ of mandamus, seeks to compel the authorities of the city of Broken Bow to levy a tax sufficient to pay judgments, aggregating something over \$8,000, obtained by the Broken Bow Water Works Company against the city upon an indebtedness for hydrant rentals, and thereafter assigned to relator, who now claims to be the holder and owner thereof. Notwithstanding the cause has, in this court, heretofore been decided against the relator (*State v. Royse*, 3 Neb. (Unof.) 262, 269), it is insisted that the conclusion reached is erroneous because the court has overlooked, and failed to give due effect to, the provisions of the statute contained in sections 1 to 5 inclusive of article VI, chapter 77, Compiled Statutes (Annotated Statutes, 10698-10702). These sections, being a part of the laws enacted under territorial organization, provide in substance that, when any judgment shall be obtained against any county, township, school district or municipal corporation and remains unpaid, it shall be the duty of the proper officers to make provision for the prompt payment of the same; and that,



if the amount of revenue derived from taxes levied and collected for ordinary purposes shall be insufficient to pay current expenses and such judgment, it shall be the duty of the proper officers to at once proceed to levy and collect a sufficient amount to pay off and discharge such judgment. Provision is also made for application to a court of competent jurisdiction to compel the proper officers by writ of mandamus to proceed to levy a tax and collect the necessary amount of money to pay off such indebtedness.

If reference be had solely to the sections of the statute of which mention has just been made, then it would seem that the relator is entitled to the writ applied for. If, however, in determining the question of the plaintiff's right, we are not confined solely to the provisions of the sections mentioned, but must determine their force and effect as they bear upon, are connected with, and relate to other provisions of the statute regarding the same subject—that is, the question of the authority and power of those charged with the duty of levying and collecting taxes for the purposes authorized and provided by law—then a different conclusion may necessarily result from such considerations. In other words, if it be proper, as we think it is, we should invoke the familiar doctrine regarding statutes *in pari materia*, which are to be construed together and, whenever possible, effect given to all their provisions. *Dawson County v. Clark*, 58 Neb. 756. The sections of the statute appealed to by relator in this case also provide for the payment of judgments against counties and school districts by the same method of taxation, and yet it will not be seriously contended, we apprehend, that county authorities may, by mandamus, be compelled to levy a tax in excess of the constitutional limitation of 15 mills on the dollar. These sections have in this respect been construed, and it is held that the constitutional limitation must be respected. *Chase County v. Chicago, B. & Q. R. Co.*, 58 Neb. 274; *Deuel County v. First Nat. Bank*, 30 C. C. A. 30; *State v. Weir*, 33 Neb.

35. Nor ought it to be urged, in the face of prior decisions, that a school district against which a judgment has been obtained may be compelled to levy a greater tax than 25 mills on the dollar, which is the statutory limitation for all purposes, with certain specified exceptions, even though such judgment remains unsatisfied because the limit of taxation has been reached in meeting other demands. *Dawson County v. Clark*, 58 Neb. 756. With these observations in mind, we, in addition to what has heretofore been said, proceed to a very brief discussion of the relator's rights as we conceive them to be in the present controversy.

It is agreed that the judgments owned by the relator represent an adjudication of the liability of the city of Broken Bow, for sums due as hydrant rental or for water supply for fire protection furnished by the water works company to the city, under an ordinance enacted for that and other purposes, and under which the water works company is operated. It is further stipulated that the municipality, ever since entering into the contract out of which the judgments grew, has each year levied, collected and paid to the water works company a tax of 7 mills on the dollar valuation of the taxable property of the municipality and that the 10 mill levy for general purposes had also been exhausted. It is the contention of the city authorities that such levies have exhausted their power of taxation for water supply under the city's contract with the water works company and that no further nor greater sum nor tax can be lawfully required, and it was upon this ground that the relator was denied the relief demanded by the former opinions and judgment of this court. The statute under which the water company was authorized to construct its water works and enter into contract with the city, binding it to pay hydrant rentals, being the charter act governing cities of less than 5,000 population and villages, in conferring such powers upon the municipalities included within its scope, among other things, provided by subdivision 15, of section 69,

chapter 14, Compiled Statutes, 1887, that such cities or villages shall have power to make contracts with, and authorize any person, company or corporation to erect and maintain a system of water works and water supply, and to furnish water to such city or village, and to levy and collect a general tax, in the same manner as other municipal taxes may be levied and collected, to pay for water furnished such city or village, under contract, to an amount not exceeding 7 mills on the dollar in any one year, in addition to the sum authorized to be levied under subdivision 1 of that section, and that all taxes raised under this clause shall be retained in a fund known as a "water fund."

By subdivision I of this same section, such municipalities are authorized to levy taxes for general revenue purposes not to exceed 10 mills on the dollar in any one year, and by subdivision II, to levy any other tax or special assessment authorized by law. These several provisions, together with the sections hereinbefore referred to with reference to the levying of taxes to pay judgments, all relate to the powers and limitations of cities of the class under consideration to levy and collect taxes, and should, as we have observed, be construed together, and effect be given to all if possible. Not only does the statute limit the amount which may be levied for hydrant rentals or water supply to a sum not exceeding 7 mills on the dollar valuation of the taxable property, but also the ordinance under which the Broken Bow Water Works Company obtained its franchise and acquired its rights against the city for such rentals provides for the number of hydrants and the price per hydrant which shall be paid by the city as such rentals and in express terms declares that a sufficient tax, not exceeding 7 mills on the dollar, shall be levied and collected annually upon all taxable property upon the assessment roll of said city, to meet the payments under this ordinance when and as they shall respectively mature during the existence of any contract for hydrant rentals, and shall be levied and kept as a

separate fund known as the "water fund," and shall be irrevocably and exclusively devoted to the payment of hydrant rentals under this ordinance, and shall not be otherwise employed. Under these restrictions and limitations as to the authority and power of the city officers to levy a tax for water supply or hydrant rentals, and the amount of taxes that may be levied for general purposes in any one year, may it be said that the relator is nevertheless entitled to a writ compelling the respondents to levy an additional tax under the provisions of the sections first mentioned, sufficient to pay the judgments obtained by the water company against the city, which are confessedly debts for water supply or hydrant rental arising under the contract and ordinance heretofore referred to? The answer must, we are satisfied, be in the negative, as it has been in the past as evidenced by the judgment entered in the cause.

The sections of the statute invoked as giving to the relator the right to an additional levy, now that his claim has been reduced to judgment, will not bear the construction sought to be placed upon it, and will not justify the unrestrained licensing of the taxing power of the municipality because, forsooth, a judgment has been obtained on a claim which otherwise, admittedly, would not entitle the relator to the relief now demanded. A construction of the sections of the statute relied on, as contended for, can not be accepted as giving the right to the relator to compel a levy of any tax necessary to pay the judgments, regardless of the nature of the indebtedness or the limitations, constitutional or statutory, placed on the taxing authorities. These sections can not be construed as though standing alone, but must be interpreted in the light of other provisions having a direct bearing on the same subject and, when so interpreted, must be given such force and effect as will follow such a construction. The legislative intent manifestly was to enforce the payment of a judgment by a levy of tax within statutory and constitutional restrictions and limitations, and not be

yond and outside of them. These sections can not have the effect of rendering nugatory well defined limitations on the taxing powers of a municipality.

In *State v. City of Wahoo*, 62 Neb. 40, it is decided, unequivocally, by this court that city authorities can not be required by mandamus to levy a tax for water supply in excess of the limit of such tax existing at the time of the contract. If the judgment in the present case partakes of the same nature and belongs to the same class of indebtedness as would a claim arising on a contract not yet reduced to judgment, then the decision just cited becomes controlling and must necessarily preclude the relator from recovering in the present case. That the same rule is alike applicable to both cases is, we think, well settled on both principle and authority. A reading of subdivision 15 of section 69, *supra*, renders it manifest that the provision therein found as to the amount of taxes which may be raised, is a limitation of the power of city authorities to levy a tax for water supply purposes. It is granted as an additional power to that authorizing a levy of 10 mills on the dollar for general purposes. It expressly limits the tax for water supply to a rate not exceeding 7 mills on the dollar. Beyond this the city authorities have no power to go by contract or otherwise. This limitation of power was known to the water works company. It was incorporated in the ordinance under and by which their rights are measured and determined. Accepting, as we do for the purposes of this case, the conclusiveness of the judgment rendered against the city, the fact, nevertheless, remains that, for the satisfaction of the indebtedness arising under the contract for water rentals and the judgment obtained therefor, and in determining the relator's rights in the premises, recourse must be had to the power conferred by subdivision 15 of section 69, which limits the tax rate to 7 mills on the dollar. It would be strange, indeed, if, in the face of such limitation of the power of taxation, the city authorities might enter into a contract creating an un-

limited liability and, by reducing the demand to judgment, give them unrestrained power to levy a tax of any sum necessary for its satisfaction. This would be accomplishing by indirection that which could not be done directly and which, generally speaking, is not allowable. The legislative policy was, undoubtedly, as it is in matters of taxation generally, to limit the power of the taxing authorities within reasonable bounds, and to protect the property of the taxpayer against extravagance, incompetency or corruption in the management of the affairs of the corporation, by suitable restrictions on the power of taxation.

The authorities are quite uniform to the effect that a judgment against a municipality has the effect, only, of an audited claim or demand. It establishes the amount legally due, but gives no new right in respect of the means of payment. *United States v. County of Macon*, 99 U. S. 582; *Supervisors of Carroll County v. United States*, 85 U. S. 71; *United States v. County of Clark*, 95 U. S. 769. In *Grand Island & N. W. R. Co. v. Baker*, 6 Wyo. 369, 34 L. R. A. 835, it is pertinently observed by Potter, J.: "As the statute with respect to a judgment does not fix its class, and does not authorize a special tax irrespective of statutory or constitutional limitation, it is obvious that we must have recourse to the claims themselves to determine to what class the judgment belongs, and whether any limit is imposed upon taxation, by which they may be enforced. The application of the converse of this proposition has not been infrequent. In the case of *Ralls County Court v. United States*, 105 U. S. 733, 26 L. ed. 1220, the court said: 'While the coupons are merged in the judgment, they carry with them into the judgment all the remedies which in law formed a part of their contract obligations, and these remedies may still be enforced in all appropriate ways, notwithstanding the change in the form of the debt.' This language was used in a cause wherein it was sought by mandamus to compel the levy of a tax to pay a judgment. The opinion in that case also recognizes that courts are powerless to require a tax to be levied

even to pay a judgment in excess of the constitutional or legislative limitation upon the taxing power."

It is urged that *Dawson County v. Clark, supra*, is authority for the position taken by relator and justifies the relief prayed for. We hardly think that case, at least those points decided therein which are now urged upon our attention, is authority supporting the contention of relator in the case at bar. In the case just mentioned, the court was considering the force and effect of article VI, chapter 77, Compiled Statutes, when construed in connection with subdivisions I and II of section 69, chapter 14, and, when so construed, it was held that subdivision II of said section 69 operated as an enlargement of the restrictions contained in subdivision I, and that article VI, chapter 77, authorized the levy of a tax to satisfy judgments against the municipality because of the provisions of the second subdivision. It was there determined only that power is conferred by article VI to levy taxes to pay judgments rendered against the corporation, and that this might be done even though the maximum amount of taxes authorized by statute to be assessed for general corporate purposes had been imposed. No discussion or consideration was given to the question of whether the nature of the claim on which the judgment was based was such as to come within some constitutional or special statutory limitation of the taxing power. The judgment there considered, and the claim upon which based, appears not to have been of the nature and character of the one here under consideration. It would probably be difficult, if not futile, for us to undertake to determine every character of demand reduced to judgment that might justly be satisfied by a special levy of taxes, in addition to other levies authorized by law, under the provisions of article VI, chapter 77. To illustrate, it may be suggested that a judgment for a tort obtained against a city might very properly be satisfied by a levy under the provisions of these sections, regardless of the amount of the levy for general purposes. Other lawful demands reduced to judg-

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ment readily suggest themselves to one's mind as of like character. When, however, these sections are construed in connection with other sections of the statute or of the constitution, and such other provisions operate as a limitation of the power of taxation for a particular purpose or purposes, as we are constrained to hold the statute relating to the levy of a tax for water purposes does in this case, then an entirely different proposition is presented and a different principle must be applied. The case at bar, in principle, is more nearly analogous to that portion of the decision in *Dawson County v. Clark*, wherein it is held that section 11, subdivision II, chapter 79 of the Compiled Statutes, 1899 (Annotated Statutes, 11039), limits the amount of taxes which may be imposed by a school district to 25 mills on the dollar, and, where the maximum amount has been levied, an additional tax to pay a judgment can not be levied, notwithstanding the provisions of article VI, chapter 77. Applying the principle thus announced to the case at bar, as we think should be done, it follows that the relator is not entitled to the relief prayed for. Believing that the conclusion heretofore reached is the correct one, the judgment of affirmance should be adhered to, and the motion for a rehearing denied, which is accordingly done.

REHEARING DENIED.

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DAVID C. JOHN, APPELLANT, v. WILLIAM J. CONNELL ET AL., APPELLEES.\*

FILED FEBRUARY 4, 1904. No. 9,373.

1. **Special Assessments: BOARD OF EQUALIZATION,** A levy of a special assessment of taxes for benefits received by reason of a public improvement, is not invalidated because the city council, sitting as a board of equalization under the provisions of section 132, chapter 12a, Compiled Statutes, 1893, after meeting in pursuance

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\* See former opinions, 61 Neb. 267 and 64 Neb. 233.



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of a regularly published notice and organizing for the purpose of equalizing such special assessment, correcting errors, etc., take a recess before the expiration of the time mentioned in the notice and prescribed by statute, provided, the city clerk or some member of such board shall be present to receive complaints, applications, etc., and give information; and providing, no final action is taken except by a majority of the members of such board in open session. *Medland v. Linton*, 60 Neb. 249, distinguished.

2. ———: ———. Where a board of equalization, in pursuance of published notice, meets at the office of the city clerk, organizes, transacts some business and then takes a recess, subject to the call of the chairman before expiration of the time mentioned in the notice, it will be presumed that the city clerk remained present at his office during the time stated to receive complaints, give information, etc., in conformity with the provisions of said section.
3. ———: ———: FINDING. A finding by the board of equalization that all real estate on which special assessments are levied, "are specially benefited and shall be assessed for the full cost of construction of such sewers according to the feet frontage," is not so fatally defective as to the requirements of a finding of uniformity as to invalidate the special assessment and render it subject to collateral attack.
4. ———: ———: NOTICE. The requirement of the statute that notice of the sitting of the board of equalization shall be published in three daily papers for a specified period of time, is met by the publication of such notice in two daily papers printed in the English language and one daily paper printed in the German language, when these are all the daily papers published in the city where the special assessment is to be made.

APPEAL from the district court for Douglas county:  
CLINTON N. POWELL, JUDGE. *Reversed in part.*

*H. P. Leavitt*, for appellant.

*Connell & Ives*, contra.

HOLCOMB, C. J.

The present litigation, which has dragged its weary length over a considerable period of time, has, as we view the record, become restricted to an inquiry relating solely to the validity of a certain special assessment of sewer

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taxes on the real estate involved in the controversy, for benefits received. In the first opinion of the court, the question not being fully and clearly presented, it was held that no sufficient objection was shown to render the taxes invalid. On a rehearing before one of the departments of the commissioners, granted solely to investigate further this one question, the subject was inquired into and the special assessment of sewer taxes was held invalid and unenforceable on two grounds. One ground was that the board of equalization, required to pass upon and adjust special assessments of this character, was not shown by the record to have held a session at the time and place given in the published notice, as required by statute, and that the proceedings thereafter had were thereby invalidated. The other ground was that there was no finding by the board of equalization that the benefits to be derived from the public improvement were equal and uniform as to all the lots and tracts to be affected, as is required by statute. A reinvestigation of the case, having these two questions specially in view, results in a contrary conclusion to that last expressed.

On the first point, the opinion last prepared follows *Medland v. Linton*, 60 Neb. 249. That case, however, is to be distinguished, because the special assessment in the case at bar was made under a statute materially differing from the one construed in the *Medland* case. The original statute provided unequivocally and without qualification that the board of equalization must hold a session for at least one day, between the hours of 9 A. M. and 5 P. M., to correct errors, hear complaints, adjust inequalities, etc., before a special assessment for a public improvement could be levied. Following prior decisions, it was decided in the *Medland* case that the record must affirmatively show the holding of such a meeting in pursuance of a published notice, at the place and for the time stated, and that such proceeding was an essential condition to a valid exercise of the taxing power. The statute as thus construed was afterwards amended (sec. 132, ch. 12a, Com-

piled Statutes, 1893), so that, when the action was taken in the case at bar which is complained of, this section of the statute, among other things, provided:

"When sitting as a board of equalization, the council may adopt such reasonable rules as to the manner of presenting complaints and applying for remedy and relief as shall seem just. It shall not invalidate or prejudice the proceedings of such board that a majority of members thereof do not, after organization by a majority, continue present at the advertised place of sitting, during the advertised hours of sitting. *Provided*, the city clerk or some member of said board shall be present to receive complaints, applications, etc., and give information; and *Provided*, no final action shall be taken by such board except by a majority of all the members elected to the city council, comprising the same and in open session."

The record in the case at bar shows that, in pursuance of a regularly published notice, the council met as a board of equalization at the office of the city clerk and duly organized by electing a chairman. The record then discloses that the call or notice of its meeting was incorporated as a part of the proceedings; several petitions were received from property owners relating to other property than that here involved, and action taken thereon, the nature of which is not disclosed by the record. It is then recited: "Motion: That board take a recess subject to call of the chairman. Attest. John Groves, City Clerk." The next meeting of the council as a board of equalization was held on August 11 following, at which time, final action was taken on the special assessment complained of, together with numerous other matters then pending before the board. The record, as we construe it, affirmatively shows that a majority of the council sitting as a board of equalization met and organized, at the time and place, and in pursuance of the regularly published notice, and met at the office of the city clerk, who was present to record the proceedings of the board and perform his duties as such. Some business properly pertaining to the meeting was

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transacted. Just how long, or covering what period of time, the board remained in session is undisclosed by the record. After the transaction of all or some of the business then before it, the board took a recess, subject to the call of the chairman. It is not necessary, says the statute, that a majority of the board continue present after they have regularly convened and organized, provided the city clerk or some member of said board shall be present to receive complaints, etc., and provided that final action be taken only by a majority and in open session. The record, we are of the opinion, discloses with sufficient certainty that these provisions of the statute have been complied with. Obviously it was deemed by the legislature sufficient if, after convening and organizing as a board of equalization, at the time and place provided in the notice, either the clerk or a member of the board should be present, at the place and during the time advertised for the presentation of complaints, petitions, etc., to receive such complaints, applications, etc., and give to such party any needful and proper information.

May we assume, without doing violence to the rule requiring the record to show affirmatively compliance with all essential conditions to a valid exercise of the taxing power, that the city clerk was present at the place of meeting of the board, which was his office, during the hours of the day mentioned, to wit, from 9 A. M. to 5 P. M., to receive applications, complaints, and give information, etc., as the proviso of the section referred to says may be done? The question must, we think, be answered in the affirmative. Here is an important city officer of a city of the metropolitan class, present at his office as a clerk of the board of equalization and to perform all duties that devolve upon him as such clerk. Manifestly it was his duty to receive complaints, if any were presented; and the statute says, in effect, that the board of equalization may convene and organize, and, if the clerk or a member of the board shall be present to receive complaints during the hours of their meeting, their personal attendance is not

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otherwise required. We are quite well satisfied that no violence is done to any legal presumption, nor to the rule adverted to, in saying that substantial compliance with the section of the statute we are dealing with is disclosed by the record; and that the tax complained of can not be successfully impeached, because of the action of the board of equalization in the manner of proceeding, while equalizing the special assessment complained of. It is conclusively shown by the record that all orders, findings and other action taken affecting substantially the special assessment, the validity of which is challenged, was done by a majority of the board while in open session.

On the other point, the record recites as a part of the proceedings of the board of equalization that: "Having fully and carefully considered all complaints or objections, both written or verbal, and having examined the property adjoining and adjacent to said improvements, and having full and personal knowledge of the character of the said improvements and the special benefits to such property respectively by reason of said work;

"And whereas it appears that due notice of the sitting of the council as such board of equalization of date July 13, 1891, was duly published in the daily papers of the city as required by law;

"Therefore, be it resolved, \* \* \* That all lots and real estate abutting on or adjacent to sewers in sewer districts aforesaid are especially benefited, and shall be assessed for the full cost of construction of said sewers according to their feet frontage and the usual scaling back process to the depth of said districts as created."

Although informal and not in strict conformity with the statutory requirement, we see no valid reason for saying the finding is insufficient and does not meet the demand of the statute requiring a finding that the benefits are equal and uniform as to all the property to be affected by the improvement. The finding that the property is specially benefited and should be assessed for the full cost of construction according to feet frontage, is tanta-

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mount to a statement that the benefits are equal and uniform. If the property is benefited according to the feet frontage, it would seem that the benefits are equal and uniform. In *Portsmouth Savings Bank v. City of Omaha*, 67 Neb. 50, where a similar question was being investigated, the soundness of the views expressed in the last opinion in the case at bar on this point was seriously questioned, and it was argued that if error was committed in this regard, it should have been corrected by a direct proceeding and not by a collateral attack. In the *Portsmouth Savings Bank* case, it is held that a finding that the property is benefited "to the full amount in each case of said proposed levies," meets the requirement of the statute as to a finding of uniformity, as against an attack by injunction proceedings. The objection is, we are satisfied, untenable, and if the finding may be regarded as subject to attack collaterally, it is in the present case not so fatally defective as to invalidate the tax thereafter levied.

It is also argued by appellant, and it seems proper here to refer to the matter, that the notice of the meeting of the board of equalization was insufficient because of the manner of publication.

One of the sections of the charter act governing cities of the metropolitan class (sec. 85, chap. 12a, Compiled Statutes, 1893), provides, that the notice of the sitting of the board of equalization shall be given by publication in three daily papers of the city. The record discloses that there are but two daily papers published which are printed in the English language, and one in the German language. The notice in the case at bar, it appears, was published in all three of the papers mentioned, being printed in the German language in the German paper. It is quite true that, ordinarily, a publication of a legal notice in a foreign language, when not expressly authorized by statute, would not be a valid notice. In the instant case, however, we think an exception arises. The requirement of the rule as to publication of notice in the English language is met by the publication in both dailies printed in that language, they

being all the daily publications in the city printed in English. The legislature hardly contemplated an impossibility, nor that a publication of the notice in English in a German daily paper should be had in order to comply with the statutory requirement. We are not disposed to adopt such a construction. The object of the notice by publication is to give the greatest possible publicity. This can best be accomplished by the notice being printed in the German language in the German paper, when that publication must be resorted to in order to publish the notice in three daily papers. Its readers of course are accustomed to the use of the German language. If published in the English language, the notice would no doubt, in a large measure, fail of its purpose. If in the English language, a large number of the readers of the paper would not get the benefit of the notice which the law intends. The objection is not regarded as tenable. The judgment last rendered in this case is vacated and set aside, and the one rendered February 6, 1901 (61 Neb. 267), reinstated and adhered to.

JUDGMENT ACCORDINGLY.

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LEWIS C. OLMSTED ET AL. V. ISAAC W. EDSON.

FILED FEBRUARY 4, 1904. No. 13,196.

1. **County Judge: DEPOSITIONS: POWER TO COMMIT WITNESS.** A county judge in this state has the same jurisdiction and powers in taking depositions that are conferred by law upon a notary public, including full authority to commit a witness for refusing to be sworn or give testimony in a proper case.
2. **False Imprisonment: PETITION.** A petition against a county judge, or a notary public, to recover damages for false imprisonment, based on such a commitment, must allege facts, not conclusions of the pleader, from which it appears that the officer proceeded without jurisdiction, or that the evidence sought to be elicited from the witness was of such a nature as to justify his refusal to testify.

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3. Petition: DEMURRER. Petition examined, and held that a general demurrer thereto was properly sustained.

ERROR to the district court for Webster county: Ed L. ADAMS, JUDGE. *Affirmed.*

*L. H. Blackledge*, for plaintiffs in error.

*J. M. Chaffin, J. R. Mercer, J. S. Gilham and Bernard McNeny, contra.*

BARNES, J.

This was an action to recover damages for an alleged illegal or false imprisonment. The suit was brought in the district court for Webster county, and the allegations of the petition were in substance as follows: That the defendant, Isaac W. Edson, was the county judge of Webster county, Nebraska; that the plaintiffs were, and had been for more than thirty years, husband and wife; that they resided in the vicinity of Inavale, and were well known to the defendants, as well as throughout a large part of Webster county; that on July 12, 1902, the defendant Ayers, as plaintiff, filed his petition and commenced his action in the district court for Webster county against the plaintiffs, and one Adelbert I. Walker, as administrator of the estate of Allen T. Ayers, deceased, and caused a summons to be issued therein for the defendants, the plaintiffs herein, only, and caused the said summons to be served on them, the answer day therein being fixed on August 11, 1902; that at the time of the acts complained of, no other summons had been issued in that action, and no appearance or other pleadings of any nature had been filed therein; that the defendant, Ayers, delivered said summons to the sheriff of Webster county for service, and also delivered therewith to the said officer a notice in customary form, stating that on July 15, 1902, the plaintiff in that action would take the depositions of the plaintiffs herein at the office of Fred E. Maurer, in Red Cloud, Webster county, Nebraska, and caused said notice and summons to be served on the plain-



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tiffs, and on the 11th day of July caused a subpoena to be issued by the said Fred E. Maurer, as notary public, and served by the sheriff, commanding the plaintiffs to appear and give their depositions in said action before said Maurer as a notary public; that the plaintiffs appeared before said officer and made known to him that they were, and for many years had been, residents of Webster county, and that they had no present intention of absenting themselves therefrom, either permanently or temporarily; that neither of them was aged, sick or infirm so as to interfere with their being present and giving testimony at the trial of said cause; that no order of the district court or a judge thereof, authorizing or permitting the taking of their depositions, had been asked for or obtained; that the attempt to take their said depositions was not in good faith, but for the purpose of harassing and vexing them; that they were husband and wife, and that they each objected, on that ground, to either of them being required to be sworn or affirmed, or become or testify as witnesses on behalf of the plaintiff in said cause; that they thereupon refused to give their depositions; that the plaintiff Ayers, one of the defendants herein, requested the notary to commit the plaintiffs for contempt, which request was refused; that afterwards, on July 21, 1902, the defendants, Ayers and Edson, agreeing together, and well knowing the facts, maliciously, for the purpose of further harassing the plaintiffs, and illegally compelling them to give their depositions in said cause, caused another notice to be issued and served on them for the purpose of taking their depositions in behalf of said Ayers, in said cause, at the office of the defendant Edson, county judge, who thereupon issued a subpoena requiring the plaintiffs to appear and give their testimony by deposition in conformity with such notice, which subpoena was duly served on the plaintiffs who, in obedience thereto, appeared before said county judge and made known to him substantially the same facts which had been made known to the notary public, and which facts and objections were reduced to writing, sworn

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to and filed by each of the plaintiffs with the said county judge; that they thereupon again refused, for said reason, to submit or give their depositions before said judge as witnesses on behalf of said Ayers; that thereupon the defendant Edson, on the demand of defendant Ayers, knowingly, maliciously, arbitrarily and oppressively, without right, jurisdiction or authority of law, made and entered an order finding the plaintiffs guilty of contempt in refusing to give their depositions, and committed them to the common jail of the county until they should submit to be sworn or affirmed and give their depositions in said cause as witnesses for the plaintiff therein, which order was under the seal of said court, and a copy thereof was delivered to the sheriff of said county, who was the jailer, and by reason thereof the plaintiffs were committed to the common jail of said county and there confined for the space of 6 days, at the end of which time they were discharged upon the writ of habeas corpus by the judge of the district court for said county because said imprisonment was illegal; that by reason of said imprisonment plaintiffs suffered severe pain, anguish of body and mind, shame, humiliation and disgrace; that they also incurred a great expense, to wit, \$150 for traveling expenses, attorney's fees and expense in defending said proceedings and procuring their discharge; that, by reason of all of which, they had been damaged in the sum of \$10,000, for which sum they prayed judgment.

Defendant Nathan A. Ayers was not served with a summons, and did not appear in the case, so the action proceeded against the defendant Edson, alone. When the case came on to be heard, defendant moved to strike out that part of the petition which recited the proceedings before the notary public, and his motion was sustained. He thereupon filed a general demurrer to the petition, which was also sustained. The plaintiffs elected to stand on their petition, and a judgment of dismissal was entered against them, from which they prosecuted this proceeding in error.

It is contended that the court erred in sustaining de-

fendant's motion to strike, for the reason that the matter stricken from the petition was necessary to show malice, and that it was referred to later on in the pleading as having been substantially stated to the defendant in the plaintiffs' objections to being sworn. In our view of the case it is unnecessary to determine this question.

It is also contended that the court erred in sustaining the demurrer to the petition and in dismissing the action, and this assignment of error is the vital question presented for our consideration. If the petition stated a cause of action before the motion to strike was sustained, it was error to sustain said motion. On the other hand, if the petition did not state facts sufficient to constitute a cause of action, then the ruling on the motion was error without prejudice. We will therefore examine the petition as it was filed, and determine whether or not it stated a cause of action. It will be observed that the gravamen of the plaintiffs' petition was the act of the alleged illegal or false imprisonment on the part of the defendant Edson. It may be stated at the outset that, in order to state a cause of action in such a case, the petition must allege facts, not the conclusions of the pleader, from which it clearly appears that the officer acted without jurisdiction, or that the evidence sought to be elicited from the witness was of such a character as would justify him in refusing to testify. It is a familiar rule that a judicial officer, whether of a court of limited or general jurisdiction, is not liable in a civil action for acts performed in his judicial capacity, if he has acquired and does not exceed the jurisdiction conferred on him by law. He is not liable for a mere error of judgment while acting within his jurisdiction, but he is not protected if he assumes to act beyond the scope of his authority. *Atwood v. Atwater*, 43 Neb. 147.

Section 373 of the code expressly confers jurisdiction upon probate judges to take depositions. By law, the defendant had the same power and jurisdiction in that behalf that is conferred by the statute on a notary public. He therefore had jurisdiction of the subject matter, to wit, the

taking of the plaintiffs' depositions. As such officer he had the power, when the proper notice was produced and delivered to him, showing due and legal service thereof requiring the plaintiffs to appear before him and give their evidence in the form of a deposition, to issue his subpoena demanding their attendance at the time and place specified in said notice. This the petition alleges was regularly done. It is stated therein that when the plaintiffs appeared before the defendant as such officer, they refused to be sworn or testify. The excuse given for such refusal was that they were husband and wife, and as such could not be compelled to be witnesses one against the other. It was further claimed that the facts authorizing the taking of their depositions did not exist. It appears from the petition that the action in which they were required to testify was one against themselves and a codefendant of the name of Adelbert I. Walker, as administrator of the estate of one Allen T. Ayers, deceased. It is not alleged that the evidence sought to be elicited from them and preserved in the form of depositions was not against their codefendant, or was evidence sought to be elicited from one of the plaintiffs against the other. The proper and orderly thing for them to have done was to have taken the oath as witnesses and if, by the questions propounded, it appeared that the answers would constitute evidence by the one against the other, to have then made the proper objections which, undoubtedly, would have been sustained. The plaintiffs had been duly served with a summons in the case in which it was sought to take their evidence; notice of the time and place for taking their depositions had been regularly served and returned to the officer before whom they were to be taken, and the plaintiffs as the witnesses named in such notice were regularly before him at the appointed time and place. In short, all the steps essential to confer jurisdiction on the defendant as such officer to take their depositions had been duly taken. Plaintiffs' contention that such jurisdiction was ousted by a showing that none of the grounds enumerated in section 372 of the code for using

the depositions on the trial of the case existed at the time it was sought to take them, is untenable. That section is not a limitation on the right to take depositions, but on the right to use them on the trial of the case; that it is not essential that the reasons which permit their use at the trial should exist when they are taken, is obvious from the fact that one of such reasons is, that the witness is dead. As bearing on this point see *Wehrs v. State*, 132 Ind. 157, 31 N. E. 779; *In re Abeles*, 12 Kan. 451. That the witnesses were parties to the action in which the depositions were sought to be taken does not strengthen the plaintiffs' case, but rather weakens it, when it is remembered that taking the depositions of a party is the only substitute we have for a bill of discovery under our practice. Besides, so far as giving testimony is concerned, parties to the action are on precisely the same footing as other witnesses. Neither was the jurisdiction of the officer ousted by showing that the witnesses were husband and wife, and that the depositions were for use in an action to which they were both parties. It is true, generally speaking, that the husband can not be a witness against the wife, nor the wife against the husband, but each may be called as a witness for or against himself or herself; and it may have been the intention of the party taking the depositions to use such evidence against the party giving it alone. No presumption arises from the facts presented by the petition that it was the intention of the party seeking to take the depositions to use the evidence of either of the witnesses against the other. The officer having jurisdiction of the subject matter and of the parties, had full authority to commit the plaintiffs for their refusal to be sworn and give testimony. *Dogge v. State*, 21 Neb. 272; *In re Abeles*, *supra*.

It follows that the petition did not state facts sufficient to constitute a cause of action, and the demurrer thereto was properly sustained. This view of the case renders it unnecessary for us to pass on the ruling of the trial court on the motion to strike.

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Maurer v. State.

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For the foregoing reasons, the judgment of the district court is

AFFIRMED.

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GEORGE W. MAURER V. STATE OF NEBRASKA, EX REL. GAGE COUNTY.

FILED FEBRUARY 4, 1904. No. 13,326.

**Mandamus: PUBLIC OFFICER: RETENTION OF MONEYS.** When one, whose term as a public officer has expired, has made full, complete and truthful report of the public moneys which came into his hands during his incumbency, and of the disposition which he has made of them, but retains some of them under a claim of right, alleged to be unlawful, mandamus is not a proper action by which to litigate the claim.

ERROR to the district court for Gage county: CHARLES B. LETTON, JUDGE. *Reversed and dismissed.*

*R. W. Sabin, Griggs, Rinaker & Bibb and Hazlett & Jack, for plaintiff in error.*

*H. E. Sackett, H. E. Spafford and A. H. Babcock, contra.*

AMES, C.

This is a proceeding in error to reverse the judgment of the district court granting a peremptory writ of mandamus. The nature of the litigation is sufficiently disclosed by a stipulation contained in the record and which sets forth all the facts considered on the hearing as follows:

"It is hereby stipulated that for the purposes of the trial in this case, that in conjunction with the facts stated in the alternative writ and answer, the following facts are true:

"1st. The respondent reserves the right to object to any evidence on the ground that the writ does not state facts sufficient to constitute a cause of action or to grant the relief prayed for therein.

"2d. It is stipulated that the respondent received as fees of the county treasurer's office of Gage county, Nebraska, for the two years of 1898 and 1899, the total sum of \$7,736.92; and out of this amount he retained the sum of \$6,000 as his personal salary, and the balance of \$1,736.92 he credited to the general fund of the county, and out of the general fund of the county he paid the help of the office during said two years the sum of \$3,125.68, and that said amount was actually paid said help, and that said help was necessary for the running of said office, and that said office was run in an economical manner. That said salary of \$6,000 and said sum of \$3,125.68 paid help, exceeded the fees and commissions of the said office of county treasurer for said two years and term the sum of \$1,388.76.

"3d. It is stipulated that the respondent as such treasurer made quarterly statements to the county clerk of said county in accordance with the statute, and that twice a year in accordance with law he filed a semiannual settlement statement with said county clerk showing, among other things, the amounts paid, time, and the manner in which the clerks and assistants were paid, and that the county board of said county approved the acts, doings, reports and statements of said respondent and made the same a matter of record in their public meeting as a board, by adopting a report in substantially the following form:

"That said George W. Maurer, county treasurer, has reported all collections made, also canceled all vouchers on hand for disbursements made; he has satisfactorily accounted for all moneys due to balance accounts, either by cash on hand, or balances due in the various banks of deposit.' "

*Stipulation of Facts as to Second Term of 1900 and 1901.*

"1st. It is stipulated that the respondent received as fees and commissions of the county treasurer's office of Gage county, Nebraska, for the two years of 1900 and 1901,

the total sum of \$8,426.04; and out of this amount he retained the sum of \$6,000 as his personal salary, and the balance of \$2,426.04 he credited to the general fund of the county, and that out of the general fund of the county he paid the help of the office, during said two years, the sum of \$4,362.64, and that said amount was actually paid said help as authorized by the county board of said county, and that said help was necessary for the running of said office, and that said office was run in an economical manner. That said salary of \$6,000 and said sum of \$4,362.64 paid said help, exceeded the fees and commissions of said office of county treasurer for said two years and term by the sum of \$1,936.60.

"2d. It is stipulated that the respondent as such treasurer made quarterly statements to the county clerk of said county in accordance with the statute, and that twice a year in accordance with law he filed his semiannual statements including vouchers, showing receipts and disbursements of his office, and conditions of his office, and how his salary, and how, and the amount and manner in which the clerks and assistants of his office were paid, with the county clerk of said county, and that he had a semiannual settlement with the county board of said county for the year of 1900, and that his accounts, statements and reports were adopted and approved, and made a matter of record by said board in open session in substantially the following language at the first and second semiannual settlements:

"That said George W. Maurer, county treasurer, after carefully checking up his office and reports, receipts and disbursements together with the funds on hand, and in the different county depositories, find the same correct, and compares with the semiannual report of said George W. Maurer.'

"3d. It is further stipulated that the county board did not adopt the semiannual statements of the respondent filed for the year of 1901, which last semiannual statement was similar to the ones filed in the year 1900.



"4th. It is stipulated that as a part of the said sum of \$1,936.60, paid out to clerks and assistants in said office in excess of fees and commissions for the years 1900 and 1901 of the second term, \$657.56 were retained by said treasurer in the year 1901, and paid to said clerks and assistants.

"5th. It is further stipulated that on March 5, 1902, J. R. Plasters, the county clerk of Gage county, Nebraska, in conformity with instructions from the county board, made a demand on the respondent for the sum of \$3,325.36, and on March 7, 1902, said respondent delivered to the relator the following communication in reply to said demand:

*"To the County Board of Gage County, Nebraska, and to J. R. Plasters, County Clerk.*

"GENTLEMEN: Your communication of the 5th of March, 1902, demanding of me the sum of \$3,325.36 of moneys retained by me for service rendered by help in my office for the years 1898, 1899, 1900 and 1901 is received. In answer I will say there seems to be a difference of opinion between the board and myself as to the law in relation to the payment of help in the office of county treasurer which the county board has found necessary for the running of the office, and as there has been no more money retained by me than has actually been paid to the help in my office, and as I believe under the law I am entitled to retain, I must in justice to myself decline to comply with the request and demand of the board, as my reports and allowances have all been adopted save the last one of 1901. I will say, however, that I am prepared to meet any legal demand in this matter that it is found I may further owe.

"Very truly yours,

G. W. MAURER."

It distinctly appears from the foregoing recitals that the respondent during his incumbency of office made full,

complete and truthful report of all the public moneys which came into his hands, and of the disposition that he made of them. The only official delinquency with which he is charged is the unlawful retention of certain of such moneys after the expiration of his term of office. Is mandamus a proper remedy for their recovery? Section 646 of the code enacts that "This writ may not be issued in any case where there is a plain and adequate remedy in the ordinary course of the law." Is not this such a case? This court has held in several cases that a writ of mandamus may be issued after the expiration of the term of a public officer, to compel him to make report of the public moneys coming into his hands during his incumbency and, incidentally, to pay into the treasury sums so ascertained to be unlawfully retained by him. *State v. Shearer*, 29 Neb. 477; *State v. Boyd*, 49 Neb. 303; *State v. Russell*, 51 Neb. 774.

In a case where such a report has not been made and is requisite for the ascertainment of the amount of moneys, if any, in the hands of the alleged delinquent, there may be no "adequate remedy in the ordinary course of the law," but in a case in which such an uncertainty does not exist, and in which the amount of the money in the officer's hands, and the nature of the claim of right made by him to its retention, are distinctly and well known, we are unable to see why an ordinary suit at law is not a plain and adequate remedy. The above statute must be supposed to mean something, and we presume that among the objects of its enactment were to preserve to defendants their constitutional right to a trial by jury in the ordinary course of the common law, and to protect them from arbitrary arrests and penalties such as are the processes solely made use of to enforce obedience to peremptory writs of mandamus. The legislature has taken extreme pains to remove from our law and procedure the last vestiges of imprisonment for debt, and we think the court can not restore that remedy in direct violation of the statute mentioned.

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It is recommended that the judgment of the district court be reversed and the action dismissed.

HASTINGS and OLDHAM, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, it is ordered that the judgment of the district court be reversed and the action dismissed.

REVERSED.

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CHARLES H. FALSKEN V. FALLS CITY STATE BANK.

FILED FEBRUARY 4, 1904. No. 13,307.

**Principal and Agent:** INSTRUCTIONS. An agent who, in good faith and without negligence, acts upon his own understanding of faulty or ambiguous instructions, is not liable in damages to his principal, although his interpretation of them may be erroneous.

ERROR to the district court for Richardson county:  
CHARLES B. LETTON, JUDGE. *Affirmed.*

*Francis Martin, Edward Falloon and C. Gillespie, for plaintiff in error.*

*Reavis & Reavis, contra.*

AMES, C.

Farrington and Towle were loan brokers doing business at Falls City in this state. The plaintiff Falsken obtained through them a loan of \$3,500 upon his note and mortgage upon a tract of land lying in that vicinity. Afterwards he loaned to Farrington \$2,500 upon the note of the latter secured by collaterals. Falsken lived at Kansas City. On the 29th day of July, 1899, he transmitted through the mails to the defendant, the Falls City State Bank, the Farrington note and collaterals accompanied by the follow-

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ing letter, as a copy of it appears incorporated into the bill of exceptions:

"KANSAS CITY, Mo., July 29, 1899. 914 E. 17 St.

"*Falls City State Bank.*—DEAR SIRS: Inclosed please find note for \$2,540 against F. E. Farrington for collection and collateral bonds; Note of \$2,500 in favor of F. E. Farrington and two Int. notes or coupons of \$15 each attached to bond. You will give to F. E. Farrington as soon as my note is settled \$2,000, Two thousand, to be paid Aug. 1-99 on my \$3,500 loan and \$75 to be paid on same Int. note also due Aug. 1-99, dated 2-7-95 due in five years. Send me receipt for \$2,000 and Int. note from the said \$3,500 note and mortgage holder against me. Said loan was made through Farrington & Towle and the balance \$465 less your collection fee send me check.

"Yours truly,

C. H. FALSKEN."

On August 1, 1899, Farrington satisfied his obligation with the bank and obtained a surrender of it and of his collaterals. On the same day, and as a part of the same transaction, the bank gave him two drafts on a New York bank for \$2,000 and \$105 respectively, and remitted to Falsken at Kansas City by draft \$462.60, the aggregate of the three sums being the amount of the Farrington note. At or about the same time Farrington's receipt for the two thousand dollars, represented by the draft for that amount, was also sent to Falsken, but by whom is not certain and we think is immaterial. Farrington, who was or soon became insolvent, appropriated the New York drafts to his own use and failed to discharge to any extent the obligation of Falsken. Falsken is shown to have admitted in the following October that the receipt had come to his hands, and he testified that he learned in the following February that Farrington had not applied the money to the payment of the plaintiff's debt. He thereupon begun a series of attempts by solicitations and threats, direct and indirect, to obtain restitution from Farrington, which were continued through the summer of 1900, but were

unavailing. He seems not to have expressed any dissatisfaction with the conduct of the bank until these efforts had proved futile, although, in the meantime, he conversed more than once concerning the transaction with the officers of that institution.

Sometime in the fall of 1900, the transcript does not disclose the date, but apparently in October or November, Falsken begun this action, alleging a breach of the contract of collection as expressed by the letter of transmission of July 29, 1899, above copied, and praying judgment for \$2,000 as moneys collected thereunder and not paid over or accounted for. The petition contains no allegation of fraud or of negligence. The answer, after admitting the contract and the collection of the money, contains what amounts to a plea of payment to the satisfaction and with the acquiescence, ratification and approval of the plaintiff. The reply is, in substance, a general denial of new matter. There were a verdict and judgment for the defendant, which this proceeding is prosecuted to reverse.

It will thus be seen that the sole question in the case is whether the defendant, acting in good faith, is justified by having paid out the money in the manner in which it did. The plaintiff contends that it is not, because, although the letter instructed the bank to pay the sum in controversy to Farrington as soon as it should be collected from him, it also directed it to send to Falsken a receipt for the money from the holder of the note and mortgage of the latter. But the two directions are not necessarily inconsistent, the holder was a nonresident, and it is not shown that the defendant or its officials knew either his name or whereabouts. The letter calls attention to the fact that the debt was contracted through Farrington and Towle, and expressly directs the payment of the money, not to the holder, but to Farrington, who thus appeared to be entrusted with the duty of seeing it applied to the desired use. It was "to be given to Farrington \* \* \* to be paid on my loan." The bank was certainly not charged with the duty of payment either singly or jointly with Far-

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rington, and if it was intended to be obligated to see to it that Farrington properly discharged his trust, that intent was not expressed, but must be inferred solely from the direction to the defendant to transmit a receipt from the holder to the plaintiff. The letter would have been literally complied with, if Farrington had paid the money to the holder, and obtained his receipt for it and delivered it to the bank for transmission. Under all the circumstances, we do not think that it was unreasonable to suppose that such was its intent, and; if so, the bank can not, of course, be held for the consequences of Farrington's default. The most that can be said, in behalf of the plaintiff, is that the letter was obscure and ambiguous with respect to a matter that afterwards turned out to be of vital importance. That it was so was due to the plaintiff's own fault or negligence, and he can not, with justice, be permitted to visit its consequences upon one who can not be accused of fraud or neglect, but, at the most, of an honest mistake. We do not think it is requisite to invoke the doctrine of ratification, but the conduct of the plaintiff for a year or more after he became fully acquainted with all the facts, tends very strongly to prove that he had the same understanding of his letter as did the defendant. It is surprising, if he supposed that his instructions had been violated to his damage in so large a sum, that he did not sooner demand reparation from the bank, especially when he encountered difficulty in obtaining restitution from Farrington. At all events, we think that the defendant is entitled to the protection of the rule that an agent who, in good faith and without negligence, acts upon his own understanding of faulty or ambiguous instructions is not liable to his principal in damages, although his interpretation of them may be erroneous. *Minnesota Linseed Oil Co. v. Montague & Smith*, 65 Ia. 67, 21 N. W. 184; *Pickett v. Pearsons*, 17 Vt. 470; *Vianna v. Barclay*, 3 Cow. (N. Y.) 281.

Such being the case, the verdict is the only one that would have had support by the evidence, and the consider-

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ation of alleged errors in the progress of the trial is not required.

It is recommended that the judgment of the district court be affirmed.

HASTINGS and OLDHAM, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, it is ordered that the judgment of the district court be

AFFIRMED.

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ELVIRA M. ALDRICH ET AL., APPELLEES, v. MARANDA J. STEEN ET AL., APPELLANTS.\*

FILED FEBRUARY 4, 1904. No. 13,172.

1. **Evidence: DEEDS: MARRIAGE: VALIDITY.** Evidence *held* not to show such total want of understanding, or such mania, affecting the transactions in question, as to avoid the deeds and marriage of Seth F. Winch for insanity, in the absence of fraud or undue influence.
2. ———: ———: **UNDUE INFLUENCE.** Evidence *held* sufficient to avoid, for undue influence, the deeds concerning all his property, of the value of many thousand dollars, made by a frail old man, who had shown symptoms of dementia, to his housekeeper, without consideration.
3. **Statute of Limitations.** Where the undue influence is alleged and shown to have continued to the grantor's death, 7 years later, only interrupted by his violent insanity toward the last, and the control of both person and property of the grantor lasted to the end, the statute of limitations against an action to set aside the deeds will not commence to run until his death as against his heirs.
4. **Marriage: MENTAL CAPACITY.** Mental weakness or even unsoundness, not proceeding to the extent of inability to contract in ordinary affairs, will not alone avoid a marriage.
5. **Divorce: DECREE: COLLATERAL ATTACK.** A decree of divorce obtained without collusion by a defendant on a cross-bill in a suit begun in a county where neither party resided, but by a resident of the state, whose motion to dismiss the cross-bill for want of

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\* Rehearing allowed. See opinion, p. 57, *post*.

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jurisdiction was denied, and who contested its allowance at the trial but took no appeal, is not open to collateral attack by his heirs in claiming his property.

APPEAL from the district court for Douglas county:  
CHARLES T. DICKINSON, JUDGE. *Decree modified.*

W. A. Saunders, W. F. Wappich and Smyth & Smith.  
for appellants.

*Thomas & Nolan, contra.*

HASTINGS, C.

This is an appeal from Douglas county. April 21, 1902, plaintiffs, two of whom were daughters and the third a granddaughter of Seth F. Winch, commenced suit, alleging their relationship; that he died February 11, 1899, at the hospital for insane at Council Bluffs, at the age of 77 years; that plaintiffs are his sole heirs; that the defendant Maranda J. Steen claims to have been Winch's wife at the time of his death, and has since married John J. Steen, who is joined as defendant, for that reason; that the other defendants claim to have acquired an interest in the land involved through Maranda J. Steen; alleged that Winch died seized of the real estate described, situated in Douglas county, and also of lots in the city of Chicago, and also of certain lands in Minnesota and of lots in Council Bluffs, Iowa; that on April 22, 1892, Winch conveyed to Mrs. Steen, then known as Maranda J. Mitchell, by warranty deed all of the real estate, except some lots in Council Bluffs and one lot in Chicago; that on April 25, Mrs. Mitchell reconveyed to him by warranty deed the same property, and on May 10, 1892, Winch by warranty deed again conveyed to her the real estate in Douglas county, subsequently caused to be conveyed to her the property in Chicago and in Council Bluffs, and in 1893, through one Foster, conveyed to Mrs. Steen the lands in Minnesota. That in 1900 Mrs. Steen conveyed a portion of the property to Alfred J. Norman, and in 1901 another portion to



George F. Morton, who on the same day conveyed to the defendant Gates, and afterwards, in the same year, she conveyed another portion of the property to George F. Morton, who conveyed it to the defendant, Mae L. Rice; that in 1902 Mrs. Steen and her husband conveyed to Mae L. Rice another portion of the property. It is alleged that each of the grantees in these conveyances took them with full knowledge of plaintiffs' rights; it is alleged that no title was conveyed by these several deeds, because the grantees knew of the insanity of Seth F. Winch and of his incapacity to convey, and, consequently, of the invalidity of Mrs. Steen's title. It is also alleged that by a sheriff's deed of December 20, 1894, the east one-fourth of lot 16, in Hawes' addition to the city of Omaha, was conveyed to Mrs. Winch for a consideration paid from the money of Seth F. Winch, procured from him when he was insane and acting under the undue influence of Mrs. Steen. It is alleged that in May, 1888, Maranda J. Mitchell took up her abode in Winch's house, first as a lodger and presently as a housekeeper, and remained with him until his death in 1899, in a state of illicit cohabitation and adultery; that she was 40 years of age when she came and Winch 66; that they lived together as man and wife, and were so reputed; that she was strong mentally and physically and a woman of prepossessing appearance; that Winch was feeble, and of feeble and unsound mind; that she acquired, and always retained, a great influence over him; that he was the owner of property to the value of about \$100,000 in 1888, almost all of which was from time to time transferred to her; that, during all of the time of their connection, Winch continued in poor health and his mental powers weak; that he remained in this condition until in 1896 a complaint was filed at the instance of Mrs. Steen, charging him with insanity, and in 1898 another, on which the board found he was insane, and he was removed to St. Bernard's hospital in Council Bluffs, where he died, wholly insane; that when the conveyances to Mrs. Steen were made, he was incapable of understanding the nature

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of the act and of making of deeds; that he was then mentally incapable of remembering the proper objects of his affection; that he was *non compos mentis*, did not understand the effect of his action and did not have mental capacity to transact ordinary business; that the deeds were induced by undue influence of Mrs. Steen; that, while they were living together in the state of adultery, she procured, besides these conveyances of real estate, mortgages, notes, moneys and securities without any consideration; that Mrs. Steen then had no income or property, and had worked at the trade of dressmaking; that she was assisted in procuring these conveyances by the family physician, Dr. Von Lackum; that, at the time of the first conveyance of real estate, April 25, 1892, there was pending and on trial, in the Cass county district court, a divorce suit, originally instituted by Winch, but in which his wife had filed a cross-bill and was asking alimony; and Mrs. Steen and Dr. Von Lackum procured the conveyance, by representing that it was necessary to prevent the wife from obtaining the property as alimony; that she fraudulently represented that the wife and the lawyers in the case would take the property from him, and he would have nothing left, unless it was conveyed to Mrs. Steen; that, before the making of the conveyances to Mrs. Steen, he had declared his intention to leave his property to his children, that, after the making of the deeds, he declared the property was his as much as it had ever been; that he was, and Mrs. Steen knew he was, easily influenced and deceived, and that Mrs. Steen procured these conveyances with full knowledge of his lack of mental capacity, and designing to defraud plaintiffs; that on May 16, 1892, she procured him to obtain a license and enter into the marriage relation with her; that the decree of divorce was rendered April 30, 1892, and the pretended marriage was therefore bigamous and void, and Winch, at that time, totally incapable of entering into a marriage contract; that the divorce action was filed by Winch in Cass county, Nebraska, against his wife, who resided in Providence, Rhode Island;

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that neither party to the action had any residence or citizenship in Cass county, and the court acquired no jurisdiction over the person of either of said parties or the matter of said action; that the decree of divorce of April 30, 1892, in Cass county, was wholly void, and the parties never lawfully divorced, and the marriage to Mrs. Steen bigamous; that since January 1, 1897, Mrs. Steen had received all the rents and profits of the premises described in the petition, to the amount of \$10,000.

Plaintiffs ask that the deeds be canceled and adjudged void; that title to the land be quieted in them, as heirs of Winch, and possession delivered; that the decree of divorce in Cass county be declared void, and the pretended marriage of Winch and Mrs. Steen set aside, and the defendants each enjoined from making any disposition of, or interfering with, the real estate, and that the defendants be required to account for the rents and profits since January 1, 1897.

Maranda and John J. Steen answered, admitting Winch's death on February 11, 1899; admitting the marriage of May 16, 1892, and that the parties lived together as husband and wife until Winch's death, and admitting the marriage to Steen; denied that Winch died seized of any of the property, and denied that in 1888 he owned property of the value of about \$100,000; admit the making of the deeds of May 10, 1892, to the Omaha property, but deny the conveyance of the property in Chicago and in Council Bluffs; admit the conveyance by Foster and wife to Mrs. Steen of the land in Pine county, Minnesota, and of lot 9, block 4, Hoppe's Bonanza, an addition to the city of South Omaha, and admit the sheriff's deed as alleged to Mrs. Steen of the last described property; admit its conveyance to Norman, and say that she owned lot 22, block 12, in Brown's Park addition, since September 14, 1889, when she bought it from Winch for \$500; that the deed of April 22, 1892, was never delivered to her, and the deed back of April 25, 1892, was made to reconvey the legal title to Winch, and, by mistake, included lot 22, in block

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12, Brown's Park, which was never intended to be conveyed. The conveyance to Morton, and by Morton to Gates, is admitted; the conveyance to Mae L. Rice is also admitted; the defendants say that the deed of May 10, 1892, by Winch to Mrs. Mitchell was in payment of \$1,250, and as consideration for an agreement between the parties of May 9, 1892, and the further agreement of May 10, that Winch was to transfer his property to Mrs. Mitchell and she was to marry him; that the written agreement was that she should take care of him during the remainder of his life, if she should outlive him, and attend to his burial, he to deed her such property as he wished her to have, in consideration of her services; that she had resided upon two of the lots in Omaha ever since her marriage with Winch, and was the owner and in absolute possession of the unconveyed portions of the real estate described in Douglas county, Nebraska, in Council Bluffs, in Chicago and in Minnesota; that Winch was of sound mind and memory, and in good bodily health, until 1896; that no undue influence was used to induce his making the deeds and delivery of property; admit her taking employment as Winch's housekeeper in 1888, and acting as such until the marriage with him on May 16, 1892, and deny any adulterous cohabitation; they deny the procuring of any complaint of insanity against Winch, and deny any request to reconvey the property; admit that Winch himself commenced the action in Cass county for divorce from his wife, and say that she appeared, and on her cross-bill a decree of divorce and alimony in the sum of \$15,000 which was fully paid by Winch, was procured.

The answer further alleges conspiracy of Norman and the plaintiffs to institute this action and deprive her of her property. The answer also complains of misjoinder of the claims of insanity and of undue influence by the plaintiffs, and pleads that the alleged cause of action did not accrue within four years before the commencement of the suit and that it is barred by the statute of limitations. They ask a dismissal of the case.

Gates and wife answered, claiming a conveyance of lot 19, Winch's subdivision, an addition to the city of South Omaha, from Geo. F. Morton, August 17, 1901; that Morton bought the property of Mrs. Steen for \$1,500, and conveyed it to Gates for the same amount; that the latter had no knowledge or information of any insanity or incapacity on Winch's part, and say that he was of sound mind on May 10, 1892, when he deeded the property to Mrs. Mitchell; these defendants also set up misjoinder, and also allege that plaintiffs' cause of action did not accrue within four years and was barred.

A similar answer was filed by Mrs. Rice and husband as to the property conveyed to them by Morton. Replies were filed, consisting of general and special denials.

Trial was had January 15, 1903, and decree entered for the plaintiffs. The court found generally for the plaintiffs. Found that Winch died in 1899, and that plaintiffs are his sole heirs, and that the mother and grandmother, Sarah Winch, was Seth F. Winch's wife, and died in June, 1898; that Winch in 1891 filed his petition in Cass county district court for a divorce from her; that she filed an answer and cross-petition for divorce; that April 30, 1892, she was granted a divorce upon her cross-petition; that it appears from the pleadings and record in this case that neither party ever resided or had any citizenship in Cass county, and that the district court of that county therefore had no jurisdiction, and the decree of divorce was wholly void; that Winch owned the real estate described, on May 10, 1892, and that he conveyed it to Mrs. Steen; that on June 1, 1893, he owned the property in Pine county, Minnesota, and conveyed it to Foster and wife, and they quitclaimed to Mrs. Steen, all without consideration, Foster acting merely for the purpose of conveying title to Mrs. Steen; that August 24, 1894, Winch procured a conveyance to be made to Mrs. Steen of a lot in Chicago, on which he had previously held a mortgage, and had this done without any consideration moving from Mrs. Steen; that in the same year, 1894, Winch procured a mortgage

to be foreclosed and the sheriff's deed to be made, conveying to Mrs. Steen, without consideration, lot 16, in Hawes' addition to the city of Omaha; that Winch died seized of lot 22 in block 12, Brown's Park, and that the same descended to the plaintiffs at his death, and that Mrs. Steen had no interest in it; that on May 9, 1892, and thereafter till his death, Winch was insane; and that all of the conveyances made by or under his direction to Mrs. Steen conveyed no title and were void, and should be delivered up and canceled of record; that Winch and Mrs. Steen went through the ceremony of marriage May 16, 1892, but that he was then insane and incompetent to enter into any marriage contract; that Sarah Winch was then his wife, and the Cass county court was without jurisdiction, and its judgment void; and that the attempted marriage was wholly void, and that no marriage between the parties was ever effected or consummated, by conduct or otherwise; and that Mrs. Steen acquired no interest, dower or title to Winch's estate because of such marriage. The court further finds that Mrs. Steen's alleged interest had been conveyed to Norman, Morton, Gates and Rice as alleged, but that each of them had notice of Winch's insanity at the time he conveyed the property to Mrs. Steen, and that all their deeds were void and should be delivered up and canceled. The court finds that the conveyances of lot 9, block 4, Hoppe's Bonanza, to Mrs. Steen, through Foster and wife, were void and should be canceled as a cloud over plaintiffs' title to that property. The court finds that the rents and profits of the premises from April 18, 1898, to the date of the decree were \$9,314.03; that Mrs. Steen had made improvements upon the property since April, 1899, to the amount of \$7,783.34; that she paid taxes amounting to \$1,530.69; that the improvements and taxes were paid out of the rents, and that she was entitled to offset them; that Mrs. Rice had made valuable improvements to the amount of \$169.11; that Gates' improvements to the value of \$11.84 should be paid for by plaintiffs; that all of the defendants should be perpetually enjoined

from conveying, incumbering or interfering with the real estate, and that the title of plaintiffs should be quieted as against the defendants; and defendant Maranda J. Steen should forthwith convey to plaintiffs the real estate in Pine county, Minnesota, and in Cook county, Illinois, and turn over to plaintiffs the possession thereof. A decree was entered in pursuance to these findings. The parties, however, do not bring error, but have entered an appeal in this court.

Appellees say that the issues are: (1) Was Winch insane when he executed all of the deeds to Mrs. Mitchell, and when he attempted to marry her, and were the deeds and marriage void on that account? (2) Were the conveyances without consideration, and procured by Mrs. Mitchell by undue influence exercised through illicit sexual intercourse? (3) Was the divorce at Plattsmouth void for want of jurisdiction over the subject matter, and lack of consent on the part of the state; and was the marriage of Winch and Mrs. Mitchell consequently void, he being admittedly insane at the time his first wife died in 1898?

Practically the question is, was Winch insane on and after May 10, 1892, till the time of his death, as the trial court found? If not, were the deeds to Mrs. Mitchell procured by undue influences? Is the statute of limitations a bar against plaintiffs' recovery of this real estate on that ground? Is the decree of divorce in Cass county a nullity?

If, as the trial court found, Winch was wholly insane in 1892 when he made these deeds and contracted this second marriage, and remained so until his death, then the setting aside of all his transactions was right and should be affirmed. None of the grantees were ignorant of the actual conditions. If, on the other hand, he was simply weak and under undue influence as a frail old man, past three score and ten, the questions as to the statute of limitations and as to the jurisdiction of the Cass county district court to grant the divorce become important.

The testimony consists of nearly 1,400 pages of stenog-

rapher's notes, taken mostly from the lips of 67 witnesses. It is conceded that there is evidence tending to support the trial court's finding of insanity. Counsel frankly say that if this record is to be examined only to see if it contains evidence which, taken by itself and uncontradicted, would warrant the conclusion reached, then there is no use of going further and the decree should be affirmed. They also confidently assert that an examination of it all will show that the weight of evidence is against the learned court's sweeping finding of insanity; and they claim that the Cass county district court was not without jurisdiction to grant the divorce; and that any claim of mere undue influence in the procurement of these deeds is barred by the statute of limitations.

A somewhat careful examination of the testimony has been made. It shows that Winch was born in 1822, was married in 1847 in Providence, Rhode Island, living there with his wife until 1856, when he went to Chicago; his history from that time is not traced until his arrival in Logan, Iowa, in 1871; after 1856 he seems to have gone home, only occasionally, to Rhode Island, where his family consisted of the wife, three daughters and an epileptic son. In 1871 he located at Logan, Iowa. He was at that time possessed of considerable money; he seems to have engaged in the business of loaning money, in the name chiefly of his wife and of a sister in Chicago, from both of whom he held powers of attorney which were placed on record; his method seems to have been to take secured notes for the full amount of the loan and legal interest, and to exact from the borrower as much additional in the way of bonus as he could obtain, calling it a "chip" or "commission." In the collection of these loans he would frequently acquire the property on which they were secured; he seems to have prospered steadily in the loan business until the year 1885, but to have been from the first inception of it a man of eccentric habits and excitable temper; his actions, as related, amply justify the description of him in these terms by his brother-in-law,



quartermaster general Denis, of Rhode Island. In 1884 a judgment for \$5,000 was recovered against him for assault by a young woman, who claimed he had enticed her to his rooms by a promise of the gift of a sewing machine; she had been employed in a family where he boarded for some years, and was just married. He seems to have had increasing troubles in his business at Logan, and to have been acquiring, in the meantime, some Omaha real estate; and in 1887, without entirely closing out his property in Harrison county, Iowa, he removed to Omaha, where he had erected an apartment house, in which he had rooms; in 1888 a woman, calling herself Mrs. Mitchell, a dressmaker, took lodging in the house, in rooms adjoining his; another lodger at the time, Mrs. Bowman, testifies that she had been preparing Mr. Winch's meals, but that, almost immediately after the arrival of the new lodger, the latter began to prepare his meals, and very shortly thereafter a door was cut between this new lodger's room and his, and that the rooms were occupied by them in common. The defendant, however, says that she was merely a lodger, and continued her work as a dressmaker, from the time of her entering the building in June, 1888, until November, 1888, when she took employment as Winch's housekeeper at \$20 a month, with board, lodging and necessary clothing. She says that she continued in that capacity and position, without any improper relations, until May 16, 1892, when she and Winch were married in Council Bluffs, Iowa. The first wife's decree of divorce was rendered at Plattsmouth, on April 30 of the same year. One witness, however, testifies positively to spending a night in their rooms in 1891, and that Winch and the woman occupied the same bed, in the room next to the one where he slept.

Dr. Tilden, introduced by the plaintiffs to testify as an expert, heard the testimony introduced by the plaintiffs; he also, in the year 1896, and again in 1898, as a member of the Douglas county insanity commission, made a personal examination of Mr. Winch and, on both occasions,

found him insane, suffering from senile dementia, with delusions, especially as to his property. He was asked whether, taking the testimony which had been produced as true, Mr. Winch was insane prior to 1896, when he came under Dr. Tilden's personal observation. The opinion was expressed that he was previously insane. The doctor was then asked, whether, in view of all the evidence, he could fix the time when Mr. Winch became insane. He replied that he could give an opinion on that point, and was asked to do so. To this latter question no objection was made. The doctor then proceeded to recite some of the facts and testimony which led him to conclude that the disease began as far back as 1884, and that its first distinct manifestation was the assault on the young woman in Mr. Winch's rooms, at Logan, in that year, and finally gave it as his conclusion from the evidence that Mr. Winch was not capable of making the deeds, or entering into the marriage contract, in May, 1892, under which Maranda J. Steen claims the real estate involved in this action. Most of this evidence is without objection. Much of it seems obnoxious to the objection that the question was put in such a manner as to cover the very issue to be submitted to the court, a form which is condemned in many well considered cases. *Dolz v. Morris*, 10 Hun (N. Y.), 201; *Smith v. Hickenbottom*, 57 Ia. 733, 11 N. W. 664; *Clark v. Detroit Locomotive Works*, 32 Mich. 348; Rogers, *Expert Testimony* (2d ed.), sec. 26.

Dr. Akin, called on rebuttal, was asked a number of questions as to the leading writers on the subject of senile dementia, and their statements. He was asked as to who is generally recognized in that community as the best expert on mental diseases, and permitted to answer, over defendants' objection, that it was Dr. Tilden. Doubtless the court "is at liberty to examine other witnesses to aid it to determine whether he (the expert) is qualified to draw a correct conclusion upon the question relating to the science or trade in relation to which he is to be examined." Rogers, *Expert Testimony* (2d ed.), sec. 17. In

the present instance, however, the examination was not for that purpose, as the evidence by Dr. Tilden had already been submitted. The purpose seems to have been to induce the trial court to give additional weight to Dr. Tilden's conclusion as to Winch's incapacity. The decision seems to have followed Dr. Tilden's opinions, and it is earnestly contended that they are not well founded; that the utmost which the evidence shows as to Winch's condition, up to the time of the making of these deeds to Maranda J. Mitchell and contracting the second marriage with her, is only weakness and eccentricity, and nothing which will justify the finding that those acts are totally void.

It is conceded that in 1896 Winch was violently insane; that he never recovered; and died, demented, in St. Bernard's Hospital in Council Bluffs in 1899; that when he made these deeds and contracted this marriage he was 70 years old and feeble in health; that the trial court was justified in finding that nothing was paid for the deeds, and in finding that the \$1,300, which defendant Maranda J. Steen says she let Winch have prior to that time, was wholly mythical, and that she herself had admitted as much in other litigation. Dr. Tilden bases his opinion that the disease had started in 1884 on the statements as to the assault upon Mrs. Rogers, together with some irrational conduct in regard to the removal of a fence, which Winch discovered, in midwinter, was over on his land a few feet. He ordered it immediately removed to his own serious detriment, by exposing his haystacks, as well as to that of the neighbor who was compelled to remove the fence. The testimony of the district attorney of Harrison county, and of the county clerk, to his lack of memory and excitability, and the testimony to the same effect by the witnesses Norman and Bolter, indicated a very great loss of memory, and the progress of the disease through 1888, 1889, 1890 and 1891. In these latter years, there was some evidence produced of his quarreling with the school children; witnesses swearing to his chasing the children with a shotgun, with a club and with a horsewhip. The

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doctor cites evidence tending to show that in a number of instances he collected notes, gave receipts against them, then forgot the transaction, and brought suit on the notes. Some testimony by Judge Sullivan of Plattsmouth, who was the first wife's attorney in the divorce suit, was mentioned, that at the time he acted quite irrationally, boasted of his dissolute relations with numerous women, of improper relations with his first wife before he married her, would laugh and cry without cause for either. These things, all combined, in the opinion of Dr. Tilden, indicated that the disease, which had proceeded to complete dementia in 1896, had already become well marked in 1892, when these symptoms were observed. These symptoms are all gathered, as fully as counsel seem to have been able to do so, in question 5440, on page 816 of the testimony, asked on cross-examination of Dr. S. K. Spalding. The latter has 31 years' experience, 20 of it in Omaha; is a graduate of the Bellevue Hospital College of New York city; had made nervous and mental diseases a specialty, and is at present United States pension examiner in Omaha. In the years 1889, 1890 and 1891 he was a member of the school board. He had known Mr. Winch since the fall of 1889, first, as a member of the school board, he rented a room from him for school purposes, from that time until July, 1890, and in April, 1890, a new contract was made, renting the same room and another for the following year for the same purpose; this business the doctor personally transacted with Mr. Winch. While the rooms were occupied as a school room, the doctor was frequently there and had frequent talks with Mr. Winch. The rooms had to be repaired and some alterations made, which Mr. Winch did. His arrangements were well considered and rational. In the spring of 1890 he began to treat Mr. Winch for bronchial trouble, for which the doctor examined him and wrote a prescription; that he treated Mr. Winch for this trouble, occasionally, until some time in the year 1895, when he was consulted with regard to Mr. Winch's kidneys, and found him suffering from excessive uric acid, which

had produced lumbago pains in his back. Dr. Spalding observed no indications of mental disease or unsoundness while treating him, up to 1895, and thinks he was entirely sane up to that time. On cross-examination this question was asked of him:

Q. Supposing a man, 60 years of age, goes to the house of a neighbor in the winter time, on a farm, and has the line fence measured, and finds that the fence is over on his land at one end about a foot, and at the other end about two or three rods; he goes to the neighbor's house in the dead of winter, when the ground is frozen and the snow on the ground, and demands the immediate removal of the fence; holds one hand in his hip pocket and threatens with his fist with the other hand, and does this over the protest of the tenant, that if the fence is removed it will destroy his own crops as well as work an injury to the neighbor, who removes the fence; but in spite of that he proceeds and requires the neighbor to remove the fence; and, about the same time, he finds a young woman on the streets of the town where he lives, who has just recently been married; this young woman had lived in the family where he had lived, for a number of years; she was a virtuous, good woman; he asked her to go over to his office: said to her, "Come over, I want to give you a sewing machine. She went into the office; he locked the door and she said, "Where is the sewing machine?" His room—the room where he stayed, his bedroom, instead of his office. He locked the door upon her. She said, "Where is the sewing machine? I don't see any in the room." He answered, "Get down on that bed there, and I will show you the sewing machine." And they had a fight, and she screamed for help, and finally was able to make her escape. Four years after that event, and in the year 1888, this same man went from his house at 7 or 8 o'clock in the morning, at half past 7 or 8 o'clock in the morning, in a country town, in the summer time, in the month of June, when the people of the town were stirring about, in a public part of the town, in sight of the court house; and he went

with a pair of slippers, pair of drawers, and undershirt and straw hat, and nothing else on his person whatever; led one horse to water to a livery stable in the neighborhood; down one alley and out another alley; took that back, and led another horse and watered it, in this condition; later, in the same summer, and not long after that, he goes to this barn, the same barn, and demands the team of another man and wants to drive that team; the liveryman says, "You can't have that team"; and, in spite of that, he goes and gets a harness and says, "Now I want to drive that team." And the man still says, "You can't drive that team," and tells him to go away and leave the barn. A few years later than that, 4 years or 3 years later than that, he commenced a divorce suit against the wife by whom he had 6 children, in a county other than the county of his residence; and, in the preliminary motions to the divorce trial, he engages in conversation with the other lawyers, on the other side of the case, and says to them, and refers to his wife as a damned old bitch, and laughs, and, in the next sentence, he refers to his children and cries; and later on in the trial of the case, he testifies upon some matters in the case in an apparently rational manner; he a little later than this becomes embroiled—before this, in the years 1890, 1891 and 1892, he becomes embroiled in quarrels with school children of the neighborhood; he runs certain of the children with a shotgun; he runs others with a buggy whip; others with a club; he drives through the streets of the city where he lives with a sulky and a peaked jockey cap, behind a horse which he supposes is fast, although as a matter of fact it is not a fast horse; in the years 1891 and 1892, at different times, he called at the office of the clerk in the village first mentioned; he speaks to the clerk of the court, and demands the inspection of certain records and, when they ask what records he wants, he says he has forgotten what records he wants, and leaves the office; at other times he goes to the clerk's office, and asks for information about certain cases, or certain records, which the deputy clerk gives

him and explains to him fully, and within five minutes he comes back, and asks for the same information, saying he has forgotten; at these visits he talks to the clerk, and to his deputy there, secretly and confidentially about matters which are not of a secret character, but of public nature and public records; and takes them into the vault of the clerk's office in order to talk to them, at times, not always, and all of these things occur prior to the making of a deed, which he made on the 10th day of May, 1892; prior to this time, he also had a housekeeper come to his house in the year 1888; she stayed with him until the year 1892, at which time, after the making of certain deeds, he entered into the marriage relation, or attempted to enter into the marriage relation with her; prior to the time he was married to her, he lived with her in the same rooms; at times they occupied the same bed; their clothes were in the same wardrobe, and she exercised great influence over him; she attended the divorce trial against his first wife at the neighboring city, sat at the counsel table—attended him when he went to the lawyer's office concerning his divorce; took an active interest in the divorce case and in all proceedings relative to it. Putting these things together, and that he, in this deed of May 10, deeded all his property in the county where he lived; in subsequent deeds, he deeded all the property he had to this woman, including not only the lands, but notes and mortgages and all securities of every character, amounting to approximately \$40,000 worth of property and lands, and this without any consideration, unless it was a few hundred dollars, or less than \$2,000 at most; taking these circumstances into consideration, are you able to say whether the man that I have described was sane or insane at the date, 1892, when he made that deed?

A. Whether he was sane or insane?

Q. Yes, sir. I will add to that question, also, that he used a catheter from the year 1888 on, until the time he died. I will add these other elements, if you will permit me, that in 1896 he was declared insane by the insanity

commission of the county where he lived, and that he died in the asylum in 1899?

A. A part of his acts show the results of a self-willed sane man, and the other part show the results of an insane man. Of course the insanity part of it, when he was declared insane by the board, he was evidently insane, but the other parts—

Q. I am asking you now for your opinion as to his sanity or insanity in the year 1892?

A. I would say he was sane.

Some complaint is made of the unfairness of Dr. Spalding, and of the fact that senile dementia is even declared by him not insanity at all. There seems, however, nothing to indicate that he was unfair in describing his intercourse with Mr. Winch during the years from 1889 to 1895, and a number of witnesses, including Dr. Gibbs, and Dr. Bailey, a dentist, B. B. Wood of the Merchants National Bank and C. S. Rogers formerly of the same institution, where Mr. Winch had a bank account from 1887 to some time in 1896, George F. West, agent of the North Western R. R. Co., and Mr. Jamison of Hayden Bros., where Winch had an account, and other witnesses including Mr. Gates, testify that there was nothing in Mr. Winch's actions or manner during the years from 1890 to 1895 that impressed them as indicating mental unsoundness. It is true that some of them, like the chief defendant herself, weakened their statements by making their testimony apply to the years 1896 and 1899, when he was admittedly hopelessly insane, as the sister of Mrs. Steen writes to the witness Norman in September, 1896, a "raven maniac."

The evidence, however, taken as a whole, indicates that in May, 1892, Winch had become a weak and feeble old man entirely under the influence of Mrs. Mitchell, as she then called herself. His institution of the action for divorce in Cass county, and his subsequent attempt to dismiss it when the first wife appeared to contest, and the prominence of Mrs. Mitchell in that litigation, and the deed-



ing to her of the property 10 days after the decree was rendered, while Winch was alarmed at the prospect of the lawyers getting it, indicate great weakness on his part, and it is not improbable that there was already, as Dr. Tilden indicates, some mental unsoundness, enough, it would seem, to render the deeds voidable in connection with the lack of consideration, and the undue influence exercised by Mrs. Mitchell. It does not seem, however, that the evidence in this case warrants a finding that there was, at that time, any such total want of understanding or special delusion causing these deeds, as would render them void, in the absence of any fraud or undue influence. *Mulloy v. Ingalls*, 4 Neb. 115; *Dewey v. Allgire*, 37 Neb. 6. There can be very little doubt that a conveyance by Winch at the time in question, fairly made to one who paid a good consideration, would have to be upheld. There are no facts in this record on which such a deed could be set aside. The action of the trial court can therefore only be upheld on the ground that, in addition to the weakness of mind, there was fraud or undue influence in the causing of the transfers, and that the second marriage was void for some other reason than Winch's insanity. If he was capable of contracting, his second marriage was valid, unless the previous one stood in the way. Compiled Statutes, secs. 1, 2, chap. 52 (Annotated Statutes, 5300, 5301).

It is urged, however, that unless absolute insanity is found to exist in this case, the action was barred by section 12 of the code. It is true that this section has been held to bar, after 4 years, an action by the heirs of a former owner to set aside a deed for fraud and undue influence. *Kohout v. Thomas*, 4 Neb. (Unof.) 80. And an owner claiming fraud in the sale of the premises by an assignee in bankruptcy has been held subject to the same bar. *Hughes v. Housel*, 33 Neb. 703.

In *Parker v. Kuhn*, 21 Neb. 413, 433, it is held that a bill to redeem by a junior incumbrancer from a sale had by a prior lienholder is governed by section 16 of the code and must be brought within 4 years. In addition to the

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above holdings, there are a great many more to the effect that a creditor's bill, claiming no interest in the title except through the fraud in the conveyance, must be filed within four years, under section 12.

These latter, manifestly, have nothing to do with section 6, which provides for the commencing of an action to recover "title and possession" of land within 10 years after it accrues. It is hard to see why this section 6 does not apply as well to a suit in equity brought by an heir to get title, who claims the deed of an ancestor is void, as it does to an action in ejectment based on the same claim. The holdings of this court, above given, seem to have settled, however, that the equitable action must be brought within 4 years.

Even this does not relieve the defendants in this case. The petition expressly alleges, and the facts show, that the control over Winch by his second wife continued steadily until his violent delusions necessitated physical restraint. This was procured by her and lasted to the end of his life. The procuring and holding of these deeds and of this property by such means was therefore a continuing act, which closed only with his death in 1899. This action was begun in April, 1902, by his heirs. No authorities have been cited to sustain a holding that a weakness and undue influence which could wrongfully cause the deeds in May, 1892, and which only increased as the years went on, would not excuse the bringing of an action by Winch while it lasted. It is not thought that any can be found. The fraud must be deemed to have continued till 1899, and the action therefore to be in time.

It remains to consider what is the effect of the Platts-mouth divorce and of the second marriage. The provision of section 1, chapter 25, Compiled Statutes (Annotated Statutes, 5324), that the marriages declared void by section 3, chapter 52 (Annotated Statutes, 5302), shall be so without any decree of divorce, would impliedly prevent all others from being so. Section 3 avoids marriages only between a white person and a negro of at least one-fourth

blood; marriages where either party has a husband or a wife, or is insane or an idiot, or the parties are too nearly related. Section 1, chapter 52, Compiled Statutes (Annotated Statutes, 5300), makes consent the essential requisite to civil contracts, which it makes marriages to be. Thus this state seems clearly to have adopted the prevailing rule that, while absolute inability to contract, insanity or idiocy, will avoid a marriage, mere weakness will not, unless it extend so far as to produce the derangement that avoids all contracts, by doing away with the power to consent. 1 Bishop, Marriage and Divorce (4th ed.), sec. 125. As we have concluded that this power was not destroyed in Mr. Winch until some time in 1895 or 1896, it follows that the marriage of May 16 was valid if the former one was no obstacle. That former marriage had been attempted to be dissolved by the Plattsmouth divorce. It is urged that section 45, chapter 25, Compiled Statutes (Annotated Statutes, 5369), forbids the marriage of a divorced person within 6 months after the rendition of the decree. The prohibition, however, extends only for 6 months after the decree. In the present case, if the divorce was valid, the continued cohabitation of the parties, under claim of marriage, after that time would make them man and wife. Winch's capacity lasted at least this long. *Eaton v. Eaton*, 66 Neb. 676.

The only remaining question is, whether or not the action of the district court for Cass county was so entirely without jurisdiction as to render the decree void. If the divorce decree was void, there was no marriage with Mrs. Mitchell. By the time the first wife died, June, 1898, Winch had become, and after that remained, hopelessly demented and incapable of assenting to a marriage. This question seems to have been carefully considered by the court at Plattsmouth after Mr. Winch, discouraged by the cross-bill, sought to dismiss his action, and have the cross-bill dismissed on the ground that the Cass county district court had no jurisdiction. This was refused, and no appeal taken. Section 6, chapter 25, Compiled Stat-

utes (Annotated Statutes, 5328), provides that a divorce may be granted in the county where the parties, or either of them, reside, on a petition by the aggrieved party. In this case the husband had applied in Cass county, though residing in Douglas, and had procured service on the wife by publication. The wife then exhibited a cross-petition. He then asked to dismiss. The district court held that he was estopped from denying his residence in Cass county, and must abide by the forum of his own selection.

Of course, the sole ground on which the motion to dismiss the cross-bill could be sustained would have been that section 6, above quoted, in giving jurisdiction "where the parties, or one of them, reside," impliedly forbade it to all other district courts of the state. No action of parties or of the court itself can enlarge the latter's powers over the subject matter. The law, alone, creates a tribunal.

In *Burkland v. Johnson*, 50 Neb. 858, the want of an acknowledgment of an arbitration agreement was held to prevent jurisdiction to render judgment on it, though all the parties were before the court. In *Anderson v. Story*, 53 Neb. 259, the county court was held to have no jurisdiction to examine the accounts of a foreign guardian, and the case was dismissed here for that reason, after having been litigated by the parties without objection in the county and district courts. In *Johnson v. Bouton*, 56 Neb. 626, it is decided that a district judge, at chambers, has no authority to dismiss an action for an injunction, and such act is void, though the parties agree that he may decide it there. In *Armstrong v. Mayer*, 60 Neb. 423, the right of the district court to entertain an appeal in forcible entry and detainer cases was denied, though both parties acquiesced and tried the case there.

In the present case, however, it is clear that an act of a party could confer jurisdiction. The first Mrs. Winch could have taken up her abode in Cass county at any time before the trial, and given the court full power under section 6 to hear the case. It seems probable that the action of plaintiff in filing there his petition and affidavit for

publication, had estopped him to object that she had not done so. That, in itself, was an implied statement that he resided in Cass county, on which she had a right to rely. Of course, if he was estopped, she, and any one claiming through her, must be, after she has acted on that estoppel. Section 11, chapter 25, Compiled Statutes (Annotated Statutes, 5334), provides that divorce cases shall be conducted as other suits in equity. Section 8 makes residence in the state essential. It seems clear that the effect of section 6, above cited, is not to limit the jurisdiction, but to provide for its exercise with due regard to parties' convenience. Of course, there was no authority of law for any publication of notice in Cass county. In the absence of any appearance by defendant, the whole proceedings would have been of no effect as against her. But she did appear and got the decree, and it does not seem that his heirs can collaterally assail it. The decisions seem to hold that appearance by a defendant in divorce cases confers jurisdiction of the person.

In *In re Ellis' Estate*, 55 Minn. 401, 23 L. R. A. 287, the claim of some heirs that their father's marriage was void because his first wife had been divorced in a county in Wisconsin, where neither party resided, was disallowed. As here, the parties had appeared, and alimony been awarded and paid. The court say that bringing the action in a wrong county is but an irregularity.

Estoppel on a party plaintiff to claim nonresidence, as affecting jurisdiction in a divorce proceeding, is distinctly held in *Ellis v. White*, 61 Ia. 644, 17 N. W. 28. In *Chichester v. Donegal*, 1 Add. Eccl. Rep. (Eng.) 13, entering appearance in London is held an estoppel to claim want of jurisdiction because of actual residence in Dublin. Other cases are cited in a note to *In re Ellis' Estate*, *supra*. Of course, as held in *People v. Dawell*, 25 Mich. 247, if neither party is actually domiciled in a state, no jurisdiction to act upon their status in that state's courts can attach. In the present case, there is no question as to jurisdiction in the state. That being so, it would seem that under the pro-

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vision, that the rules of equity procedure shall apply to divorce proceedings, the ordinary rules of estoppel must apply.

Is it, however, necessary that it be held that the action of the Cass county district court was right, in order to make it conclusive? The question as to jurisdiction here is not as to the powers of the court, but whether those powers were brought into action by the facts of residence and the situation of the parties, brought about by their own acts. The question as to the court's jurisdiction under those facts was raised and decided. That decision remains entirely unmodified. Was not the court authorized and required to pass upon the existence of these facts and their effect, and is not its adjudication conclusive until reversed or modified? *Phelps v. Mutual Reserve Fund Life Ass'n*, 112 Fed. 453, 50 C. C. A. 339; *Dowdy v. Wamble*, 110 Mo. 280; *City of Delphi v. Startzman*, 104 Ind. 343; *State v. Scott*, 1 Bailey (S. Car.), 294; *Strohmier v. Stumph*, Wils. (Ind.) 304.

We are satisfied that the decree of divorce is valid as against this collateral attack.

It is recommended that the decree of the district court setting aside the several deeds of conveyance be affirmed, and that so much of said decree as disaffirms the marriage of Seth F. Winch and Maranda J. Winch be reversed and set aside, and that the title to the several tracts of land therein set aside be decreed to be in said plaintiffs, subject to the dower right in said Maranda J. Winch and her grantees, if she has conveyed it.

AMES and OLDHAM, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the decree of the district court is so far modified as to judge and affirm the validity of the marriage of Seth F. Winch and Maranda J. Winch, now Maranda J. Steen, as alleged in the answer and cross-petition of the said Maranda J. Steen, and that the title of the plaintiffs in

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the lands described in the petition, by them inherited from their father, the said Seth F. Winch, is subject to the right of dower of the said Maranda J. Winch and her grantees, and, as so modified, the decree of the district court is affirmed.

JUDGMENT ACCORDINGLY.

The following opinion on rehearing was filed June 30, 1904. *Decree of district court affirmed:*

1. **Divorce: JURISDICTION.** The district courts of this state have no jurisdiction of the subject of divorce except such as is given them by the statute providing for divorce and alimony.
2. ———: ———: **RESIDENCE.** The residence of one of the parties in the county in which the action is brought is necessary to the jurisdiction of the court.
3. **Judgment: JURISDICTION: COLLATERAL ATTACK.** When the record affirmatively shows the nonexistence of some fact necessary to the jurisdiction of the court over the subject matter of the action, a judgment pronounced therein will be void and may be collaterally attacked.

SEDGWICK, J.

Argument was had before the court upon the motion for rehearing in this case. The principal question discussed was the jurisdiction of the district court for Cass county in the divorce proceedings discussed in the former opinion. It appears that in those proceedings the court found that neither party was a resident of the county. In fact, after Mr. Winch had begun that action for a divorce, and his wife had filed her cross-petition asking for a divorce and alimony against him, he sought to dismiss the proceedings, and for that purpose challenged the jurisdiction of the court upon the grounds specifically alleged by him, that neither party was a resident of Cass county. This was not controverted by the cross-petitioner, but it was urged that Mr. Winch, by bringing the action in that county, was estopped to deny the jurisdiction of that court. This theory appears to have been adopted by the court and,

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accordingly, the action was proceeded with upon the cross-petition, and a divorce decreed in her favor.

1. In *Cizek v. Cizek*, 69 Neb. 800, the second proposition of the syllabus is:

"Jurisdiction of the court in matters relating to divorce and alimony is given by the statute, and every power exercised by the court with reference thereto must look for its source in the statute, or it does not exist."

The jurisdiction of the district court to decree a divorce is given by section 6, chapter 25, Compiled Statutes (Annotated Statutes, 5328):

"A divorce from the bonds of matrimony may be decreed by the district court of the county where the parties, or one of them, reside, on the application by the petition of the aggrieved party in either of the following cases."

There follows a statement of the grounds for divorce.

Section 8 places further restrictions upon the party applying for divorce:

"No divorce shall be granted unless the complainant shall have resided in this state for six months immediately preceding the time of filing the complaint, or unless the marriage was solemnized in this state, and the applicant shall have resided therein from the time of the marriage to the time of filing the complaint."

This language clearly is not intended to enlarge the jurisdiction of the court. We think the reasonable construction of these sections is that the district court has no jurisdiction in divorce cases unless one of the parties is a resident of the county. The place of residence of the parties, being a question of fact, must be investigated as other questions of fact are investigated. If the pleadings had presented that issue, and the record showed that evidence had been taken thereon by the court, the question whether a judgment rendered therein would be conclusive upon the parties as against a collateral attack, would be a very different question from the one presented here.

This record shows conclusively that neither party re-



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sided in Cass county when the cause was begun, nor when it was tried.

In questions of jurisdiction over the person, the rule is that, when the record shows that no such jurisdiction exists, the judgment rendered against such party is void, and its validity may be shown in any action in which it may be called in question. *Chicago, B. & Q. R. Co. v. Hitchcock County*, 60 Neb. 722; *Fogg v. Ellis*, 61 Neb. 829. The same rule, of course, is applicable to questions of jurisdiction over the subject matter. We conclude that the divorce proceedings in Cass county were void, and that no rights can be predicated thereon.

2. Upon the question of the insanity of Mr. Winch at the time of the execution of the instruments attacked in these proceedings, and also upon the question whether those instruments were procured from him by undue influence, we are satisfied with the reasoning of the commissioner upon the former hearing, and also with the commissioner's discussion of the application of the statute of limitations to these proceedings. The claims of the defendants William H. Gates and Henry Rice are, in their brief, predicated entirely upon the validity of these conveyances, which were by the commissioner held invalid. This appears to dispose of all of the questions raised in the case.

The judgment of this court upon the former hearing modified the decree of the district court. That part of our former judgment is therefore vacated and the decree of the district court

**AFFIRMED.**

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**PARKE GODWIN ET AL. V. LOUIS HARRIS.**

**FILED FEBRUARY 4, 1904. No. 13,337.**

1. **Lease: FORFEITURE.** In the absence of a statute providing otherwise, unless such demand is waived by the terms of the lease, a demand of rent on the day it becomes due is necessary to work a forfeiture of the lease for nonpayment.

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2. ———: **WAIVER.** The lease in this case *held* to contain no waiver of such demand.
3. **Constitutional Law.** The amendatory act to section 1020 of the code of 1875, providing for demand of rent and forfeiture at any time after default, *held* unconstitutional as not properly entitled and not repealing the section sought to be amended, and leaving the common law requirement of demand on the rent day in force until the curative act of 1903.

ERROR to the district court for Douglas county: WIL-  
LARD W. SLABAUGH, JUDGE. *Reversed.*

*James H. Van Dusen*, for plaintiffs in error.

*F. A. Brogan*, *contra.*

HASTINGS, C.

Plaintiffs in error, defendants below, and hereinafter called defendants, complain of a judgment for restitution in an action for forcible detainer. November 1, H. D. Estabrook leased the premises in question to the defendant Godwin for the "term from the first day of November, 1901, until the first day of December, 1901, and thereafter from month to month so long as the rent shall be paid and the other covenants of the lease kept and performed. \* \* \* This lease not to be in force later than the 1st day of November, 1902." Godwin took possession and has held it ever since. The codefendant Brown is in possession of a portion of the premises under a sublease from Godwin; before the expiration of the lease an extension for two years, by mutual consent, was indorsed upon it and signed by the parties. By deed dated October 28, 1902, Estabrook conveyed the premises to the plaintiff Harris. The deed was delivered to Harris November 5, 1902. November 8, notices were served on defendant Godwin, by both Estabrook and Harris, of the sale and that his lease would terminate in 40 days, and that November's rent was payable to Harris and that it was demanded by him. On November 10 the formal three days' notice to quit was

served on defendants, they having paid no rent for November. November 14 of that year Harris commenced this action and, on the 26th day of the same month, recovered judgment for restitution, which was appealed by the defendants to the district court. The complaint is that the defendants neglected, failed and refused to pay the rent for the month of November, 1902, which rent was, as provided in the lease, payable on the first day of November, and the action is based on the assumption that, because of such nonpayment, the lease was terminated. Plaintiffs in error claim that the portion of section 1020 of the code, providing that "a tenant shall be deemed to be holding over his term whenever he has failed, neglected or refused to pay the rent, or any part thereof, when the same was due," is unconstitutional and void: First, because it was added by way of amendment, and the amendatory act of 1875 contained no repealing clause, contrary to section 19, article 2 of the constitution of 1866; and second, because the provisions of the amendatory act of 1875 are not germane to the original section which the act purported to amend. It is therefore claimed that the title to the amendatory act does not indicate its subject, and the act is therefore obnoxious to another clause of section 19, article 2, which requires the subject of the act to be expressed in its title. It is argued that, the amendment of 1875 being void, the forfeiture for the nonpayment of rent can only be enforced in the manner provided by the common law. It is claimed that there is not enough in the act, without the amendment of 1875, to warrant proceedings against a tenant holding over his term and, at any rate, that these defendants can be held to be tenants holding over their term only by virtue of that special enactment of 1875, because the lease runs more than a year longer, and could be terminated according to its terms in three ways: By the expiration of its terms; by forfeiture for the nonpayment of rent; and by a sale of the premises, when the lease should be terminable by a forty days' notice.

Among the stipulations of the lease was one that "the second party further agrees that, if the said rent shall not be paid promptly at the time the same shall become due, then this lease shall at once terminate." The defendants claim that such provisions, while in form an agreement that failure to pay the rent shall terminate a lease, have always been construed as provisions in favor of the landlord. They may be waived by him and are waived unless due steps are taken by him to reenter and forfeit the lease.

It is then urged by the defendants that the forfeiture at common law, where there is no statute to aid it, must be a demand on the precise day the rent becomes due of the amount of the periodical payment; that such demand must be before sunset and continue until after sunset, with demand of possession at that time. This rent was due on November 1. Mr. Harris' deed was only delivered to him November 5, and payment of the rent was demanded by him on the 8th; notice to leave was served on the 10th, and this action brought on the 14th of the same month; there was therefore no demand of the money on the day that it became due, and none of the above formalities enacted upon the premises. Defendants claim that, since the statute is invalid and the common law requirements have not been complied with, there was in this action no demand and no forfeiture, and the judgment of restitution is consequently erroneous. They say that no statute of the state of Nebraska, except the void one contained in the amendment of 1875, abrogates this rule of the common law, and that the holdings in this state, that tenants failing to pay rent shall be deemed holding over their term, all rest upon this void statute. The defendants also claim that by the terms of the lease the rent was payable at the office of Estabrook's agent; that the demand for the payment of rent by Harris was in writing, and served by a deputy sheriff, and designated no place at which the rent should be paid; that no change of agent was made and, before the commencement of this suit, the rent was tendered to Mr. Estabrook's agent, who refused it. He had in

fact given Godwin notice on November 3, when the October rent was paid, that he could receive no more rent. Rights are also predicated on the notice from Estabrook and plaintiff, served November 8, stating that the premises were sold and that defendants' rights under the lease would terminate in 40 days from the receipt of that notice. It is urged that this is a complete waiver of any forfeiture for nonpayment of rent on November 1.

The position of the plaintiff, defendant in error here, appears on page 17 of his brief: "If we are correct in our position that, under the law of the state of Nebraska and under the terms of this lease, nonpayment of rent gives the lessor an option to be exercised at any reasonable time thereafter by demand and notice to terminate the lease for nonpayment of rent, then it follows," etc. He claims that the right to forfeit at any time after a default for rent, by a demand for it under the terms of this lease, existed independently of the act of 1875.

The only clause of the lease on which a forfeiture is claimed is, "If the said rent be not paid promptly at the time that the same becomes due, then this lease shall at once terminate, and the party of the second part agrees to surrender the immediate possession of the same." This clause, undoubtedly, would be sufficient at common law to warrant a forfeiture of the lease, if a demand were made with due formality of payment of rent on the day it became due and it were not paid. Does it waive such demand? If not, is the act of 1875 excusing such demand valid?

There can be no question, and none is raised by the plaintiff, as to the fact that at common law a demand, with all due formalities, must be made on the day the rent becomes due and before the tenant enters upon another term. The cases cited by defendants' counsel abundantly establish that this demand is required at common law, unless expressly waived. Ordinarily, such waiver is contained in the words "without further notice or demand" in the provision for the forfeiture, as in the case of *Pendill*

*v. Union Mining Co.*, 64 Mich. 172, 31 N. W. 100. Of course, the same waiver might be expressed in other apt terms, but we do not find anything in this lease equivalent to it. It would seem that, in the absence of the clause of section 1020 of the code doing away with such demand and notice of forfeiture on the precise day that the rent becomes due, any demand after that day and before the arrival of the next rent day would not be good. Whether such demand must be accompanied with all the ancient formalities of the common law, it is not necessary to decide. If not made on the day it is due, and the tenant enters upon a new term, it is at common law deemed to be waived. The landlord is then held to be relying upon his action for the accruing rent. See the cases collected in 32 Cent. Dig. col. 370. It is certainly waived in this instance, so far as any forfeiture of November 1 is concerned, by the formal notice of November 8, that the tenancy would terminate in forty days from that date. This distinctly recognizes the tenancy as still existing at that time. There are, too, numerous cases holding that it is only the owner of premises at the time of a forfeiture who can avail himself of it. His grantee can not. *Small v. Clark*, 97 Me. 304, 54 Atl. 758.

We are constrained to think that, in the absence of a statute permitting demand and forfeiture for overdue rent at any time, plaintiff had no right of action for forcible detainer in this case.

It remains only to consider whether the act of 1875 is open to the objections made to it. It seems clear, and no attempt is made by the plaintiff to dispute it, that it is obnoxious, under the former decisions of this court, to both of the objections made against it. Its subject is not expressed in its title, and it does not repeal the section which it seeks to amend.

It is recommended that the judgment of the district court be reversed and the cause remanded for further proceedings according to law.

AMES and OLDHAM, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is reversed and the cause remanded for further proceedings according to law.

REVERSED.

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CHARLES W. OAKES, APPELLEE, v. ARTHUR C. ZIEMER ET AL., APPELLEES, AND SARAH GRUNINGER, APPELLANT.

FILED FEBRUARY 4, 1904. No. 13,358.

1. **Decree: OPENING.** The dismissal of an application made by a non-resident defendant to open a decree under the terms of section 82 of the code for want of notice, when such dismissal is based on defects in the answer tendered, does not bar a new application in which such defects are remedied.
2. **Res Judicata.** The first dismissal, however, bars another one on the same grounds as the first, unless it affirmatively appears from the record that such matters were not considered on their merits.
3. ———. The answer in the present case held to tender no issue as to the existence or the amount of the plaintiff's tax lien. The former answer, which was held insufficient, presented all the facts on which appellant bases a claim of right to open the decree merely for the purpose of redeeming. There being nothing in the record to indicate that this question was not heard upon its merits, it must be deemed settled by the former dismissal and its affirmance.

APPEAL from the district court for Lancaster county:  
LINCOLN FROST, JUDGE. *Affirmed.*

*Ricketts & Ricketts*, for appellant.

*I. H. Hatfield and S. L. Geisthardt*, contra.

HASTINGS, C.

In *Oakes v. Ziemer*, 61 Neb. 6, and in the same case on rehearing, 62 Neb. 603, the subject matter of this case has already been under consideration in this court. It is an attempt on the part of Sarah Gruninger, nonresident de-

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fendant, to open a decree rendered against her and others in favor of Charles W. Oakes in foreclosure of a tax lien. A former application was dismissed by the district court in the following terms: "It appearing to the court that said application tendered no issue as against the plaintiff by the showing now on file, it is therefore by the court ordered that said application to open the decree of the court heretofore entered herein be, and the same hereby is, denied." The former proceeding, like this one, was an attempt to open up the decree under section 82 of the code because of appellant's nonresidence and of no actual notice to her of the pendency of Oakes' action to foreclose his tax lien. The present application was also dismissed by an order in the following terms: "This cause now comes on to be heard upon the motion of the defendant Sarah Gruninger, to open the judgment and decree of the court heretofore entered herein, and for leave to defendant to answer the plaintiff's alleged cause of action, and is submitted to the court; on due consideration whereof and being fully advised in the premises, the court finds that one application to open up the judgment and decree herein, made by the same defendant, has been overruled, and that the same question was therein adjudicated; it is therefore by the court ordered that said motion be, and the same is, overruled; to which ruling the said defendant Sarah Gruninger duly excepts, and is allowed forty days from the rising of the court in which to reduce her exceptions to writing, and the supersedeas bond herein is by the court fixed at the sum of \$100." The defendant Gruninger appeals.

Was the former conclusion, as the trial court found, an adjudication upon the merits preventing the present one? Is the new matter in the answer now filed sufficient to warrant opening the decree? The answer to the first query seems to be governed by that to the latter one. The record shows that the dismissal of the first application was because, in the judgment of the court, the answer tendered with it presented no issue as against Oakes' petition. It is true that the order of dismissal merely speaks of no



issue "in the showing on file," but, as the only place in this showing where an issue could be tendered would be in the answer required to be filed with the application to open, it seems clear that the action of the trial court in the first case amounts to a finding that no sufficient answer was presented, and therefore no opening of the judgment could be had. This was clearly the basis of the affirmance of that action in all three of the opinions filed in it. No reason is seen why an insufficient answer should be any more conclusive of the merits when it is offered in connection with an application to open a judgment than it would be upon a direct demurrer.

In *State v. Cornell*, 52 Neb. 25, 38, the relator had failed to charge the tender of a bond, which was necessary to the accruing of any right to have a contract awarded him. A demurrer to his petition was filed; he asked leave to file an amended petition, and it was denied him; his action was dismissed; he began a new one, putting in the missing allegation; the dismissal was pleaded in bar; the plea, sustained by the lower court, was overruled in this, the court saying:

"The former adjudication determined no more than that the pleading, as presented, was insufficient; that the facts therein stated did not constitute a cause of action, not that the party presenting the pleading did not have a cause of action." Citing *Gould v. Evansville & C. R. Co.*, 91 U. S. 526. This case goes to the point for which it was cited and is supported by *Wiggins Ferry Co. v. Ohio & M. R. Co.*, 142 U. S. 396; 2 Black, Judgments (2d ed.), secs. 707-709; 1 Freeman, Judgments (4th ed.), sec. 267. Mr. Freeman, at the place cited, indicates that the authorities are in conflict, but that their weight is in favor of the proposition that, if it distinctly appears from the record that the decision was based upon the want of an allegation which was subsequently supplied, the second action, in which such defect is cured, will not be barred by the former's dismissal.

It is true that in this case counsel claim that the answer

is not directly passed upon; that it is the motion which is under consideration, and that the answer is, as the trial court seemed to indicate, a part of the showing in support of such motion, and that the appellant stands in the situation of one who, having set up a cause of action, fails to support it with sufficient evidence. This can hardly be the case. The presentation of a sufficient answer is one of the conditions for the consideration of an application to open a judgment. In the absence of such an answer the court would have no authority to look at the application. It seems to us clear that a record which shows the rejection of an application for want of a sufficient answer can not be held to be a bar to a new application upon a different answer which is sufficient. Of course, it would be a bar to any further application based upon the same answer or one identical in substance, and that, we take it, is the real ground of the trial court's conclusion in this case, that the present answer is substantially like the one passed upon in the dismissal of the former application. It was no doubt concluded that the present one was equally defective in the same way.

It is true that the answer now presented contains a denial verbally sufficient. The denial in the old answer was held bad for indefiniteness, and because it was based merely on want of information. The new answer admits title of Ziemer and that the property was subject to taxation in 1892 and 1893, and then contains a general denial, "except as admitted or modified." The admissions include one of plaintiff's certificate of tax sale, implied in an allegation that it was issued on January 5, and was void as the treasurer had no authority to make any public tax sale on that day, and in an allegation that it did not contain recitals necessary to make it valid if based upon a private tax sale. There is also an allegation that the certificate gave no authority to pay subsequent taxes, and a plea of a right to redeem from them. The answer therefore impliedly admits the tax sale certificate and the payment of subsequent taxes, and does not set up any

facts going to show that Oakes' purchase at tax sale and payment of subsequent taxes did not create a valid lien to the amount he claimed. The new answer contains an assertion in terms of a right to redeem, on the appellant's part, from Oakes' lien because of her mortgage on the premises. This right, however, if it exists, fully appears from the facts set up in the first petition.

The cross-petition contained in the present answer is not claimed to differ in any material respect from the cross-petition in the former answer, and would seem to confer no new right. The present answer, like the first one, seems to raise only the question of the right to redeem from plaintiff's decree and from the sale under it, because of the failure to receive personal notice of his action, and not because of any sufficient defense to it. It seems also that the two former opinions must be held to have adjudicated that the appellant had no such right; that her right to open the decree depended upon her not having simply an equity of redemption in the premises, which was sought to be foreclosed by that decree, but upon her having a substantial defense to the merits of the plaintiff's claim, or some part of it, which she had had no opportunity to present. We find nothing to indicate that such right of redemption was not as fully presented at the former hearing as it can be in this one, and such being the case the former decision has clearly become the law so far as this action is concerned. *State v. Cornell*, 52 Neb. 25, and cases there cited.

A final judgment will be presumed to have been upon merits, unless the record shows otherwise. *Durant v. Essex Co.*, 7 Wall. (U. S.) 107. As to the matters actually embraced in the first answer, the former dismissal is a complete bar. The formal denial can not be treated as raising an issue upon the question of the existence or amount of the tax lien. Whether or not the right of redemption, and the setting of it up, should be held sufficient to constitute an answer and to call for the opening of a judgment, it is not necessary for us to decide at this time.

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This claim was as good under the former answer as it is now, and the former dismissal must be held to have settled it so far as this particular judgment is concerned.

It is recommended that the order of the district court be affirmed.

OLDHAM, C., concurs.

AMES, C., having been of counsel, did not sit.

By the Court: For the reasons stated in the foregoing opinion, the order of the district court is

AFFIRMED.

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J. H. CLINE, APPELLANT, v. F. A. STOCK ET AL., APPELLEES.\*

FILED FEBRUARY 4, 1904. No. 13,050.

1. **Riparian Rights.** "A riparian's right to the use of the flow of the stream passing through or by his land, is a right inseparably annexed to the soil, not as an easement or appurtenance, but as a part and parcel of the land; such right being a property right, and entitled to protection as such, the same as private property rights generally." *Crawford Co. v. Hathaway*, 67 Neb. 325.
2. —: **SUBSEQUENT APPROPRIATION: PLEADING.** A riparian proprietor, whose use of the stream for water power is impaired by subsequent appropriations of the water and whose loss thereby is not offered to be compensated, is not required, in an action to enjoin such appropriation, to set up specifically what rights are claimed by the appropriators severally or jointly. It is sufficient if he set out his own right, its priority and the injury to it, the fact of no compensation for its loss, and in general terms the wrongfulness of the appropriation.
3. —: **PETITION FOR INJUNCTION.** It is not a fatal objection, to a petition for injunction against a large number of defendants taking water from a stream at many points at long distances from plaintiff's mill, and persisting in doing so, and making arrangements to continue the practice to the injury of plaintiff's mill, without compensation, that it asks no other specific relief than the writ.

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\* Rehearing allowed. See opinion, p. 79, *post*.

APPEAL from the district court for Hitchcock county:  
GEORGE W. NORRIS, JUDGE. *Reversed.*

*Samuel J. Tuttle and A. S. Tibbets*, for appellant.

*F. I. Foss, F. M. Flansburg, W. S. Morlan, Ralph D. Brown and Hainer & Hainer*, contra.

HASTINGS, C.

The plaintiff in this action, after describing the character and course of the Republican river, alleges ownership, ever since 1873, by himself and his grantors, of a 200 barrel a day flouring mill erected upon his lands, through and along side which the river flows at Concordia, Kansas, requiring for its propulsion 70 horse power, 200 cubic feet of water a second under an 8 foot pressure; that this was abundantly furnished by the river until the facts complained of; that the mill cost him \$25,000 and the water power was of the value of \$3,000 a year; that since 1894 there has not been enough water to propel the mill during the months of June, July and August; that its volume has steadily diminished during that time, and for the last two years, including 1901, the river has been, during these months, entirely dry, and that this is because of the "unlawful and wrongful acts of the defendants and each of them"; that they have "diverted the waters of the Republican river and its affluents therefrom, pouring the same into the land adjacent, where they have become absorbed for irrigation purposes"; and plaintiff alleges his damage at \$10,000 a year; he sets out that the amount of water taken by each of the several defendants amounts in the aggregate to 317 cubic feet, and 1,459 inches a second, and says this is taken mainly through the months of June, July and August; he says that the defendants have made plans, appliances and arrangements to continue this diversion of the water, and will do so, unless prevented by the court; that such diversion is contrary to the constitu-

tion of the state of Nebraska, and that of the United States, in taking away his riparian rights and so depriving him of his property without process of law; that plaintiff's priority and right to use the water was recognized by local customs, laws and decisions of the courts in the states of Kansas and Nebraska, and no offer of compensation has been made him; that the defendants' acts are contrary to section 2339 of the Revised Statutes of the United States and that this section acknowledges and confirms the plaintiff's rights; that the action for injunction is brought to save multiplicity of suits at law, and also for the reason that plaintiff has no adequate remedy at law. An injunction is asked against all of the defendants, restraining them from diverting the waters of that river and its affluents and not returning the same into the channel.

Separate demurrers were filed by the several parties. Most of them on three grounds: (1) Improper joinder of causes of action; (2) No facts sufficient to constitute a cause of action; (3) Because the petition is for an injunction alone, and shows no ground for one. One of the demurrers adds a fourth ground, a lack of jurisdiction, as it is an attempt to adjudicate matters in dispute between states.

The demurrers were sustained, and plaintiff elected to stand upon his petition, and judgment of dismissal was entered, from which the plaintiff appeals. He insists that his petition disclosed a right to an injunction; that as riparian owner he had the right to the unimpaired flow of the river; that he had such right by prescription dating from 1873; that, if the doctrine of appropriation is held to prevail, his appropriation was prior in time, was the best right, and is protected by the Nebraska and the federal constitutions; that this right has been impaired by the defendants; that his remedy at law is inadequate, and that the interposition of equity is necessary to prevent a multiplicity of suits.

Defendants, on the contrary, assert rights on the basis of the fact that the Republican river is meandered in the

United States survey, and should be held a navigable stream. It is sufficient to say as to this that the petition alleges that it is not a navigable stream, and sets up ownership of its bed and banks in the plaintiff, which is admitted by the demurrer.

The defendants also urge that the common law is in force in Nebraska, except so far as modified by statute, and that the common law permits no appropriation of streams and no prescriptive right as against an upper owner. This seems to be the effect of the holdings in *Clark v. Cambridge & Arapahoe Irrigation & Improvement Co.*, 45 Neb. 798; *Slattery v. Harley*, 58 Neb. 575; *Crawford Co. v. Hathaway*, 67 Neb. 325, and *Meng v. Coffee*, 67 Neb. 500. In paragraph four of defendants' brief, they seek to find under the common law doctrine, that the stream as a whole belongs to each owner and that each has a right to a reasonable use of it, authority for their action in taking, as plaintiff alleges and the demurrers admit, all of the water out of this stream during the three summer months. The general statements of the rights of each riparian owner to a reasonable use of the stream are cited from various text writers and decisions. That any court has ever held that, in the exercise of common law rights, even a riparian owner was at liberty to take out all the water and leave the stream dry for three months in the year, these citations do not show. The most that has been held allowable in any of the cases cited was a reasonable diminution for purposes of irrigation in the amount of flow, and that equity would not enjoin the use of a stream for irrigation, merely that it might run by in unimpaired quantity for one who was making no use of it.

It is urged that the legislature in this state by section 43, article 2, chapter 93a, Compiled Statutes (Annotated Statutes, 6797), has provided, that the right to divert unappropriated water of natural streams shall never be denied, and that priority of appropriation shall give a better right between those using water for the same purpose, but that those using water for domestic purposes shall

have preference over all others; and those using it for agriculture have a preference over those using it for manufacturing; that the allegation of the petition that the diversion is unlawful is a mere conclusion; that the diversion of the water is presumed to be in accordance with law, and that, as the petition alleged that the water is "absorbed for purposes of irrigation," it will be presumed to have been taken out under rights derived properly from this state, therefore no right to interfere with it exists on the plaintiff's part. It is urged that the United States statute of 1866 has reference only to the public lands and furnishes no countenance to the riparian rights claimed by plaintiff, in the absence of any allegation bringing those rights under that statute. It is also urged that if there has been any interference with plaintiff's rights his remedy is, in the first place, not by injunction, but by a suit for damages; and, in the second place, he has shown such laches in permitting the irrigation works to go on, that he is entitled to no remedy in equity. It is finally urged that the action is an attack upon the sovereignty of Nebraska; that it is an action brought by one living in Kansas for the diversion of water within the state of Nebraska, and is an attempt by one without the state of Nebraska to assert a right which is in contravention of the laws of this state, and can not therefore be recognized by this state's tribunals. These several reasons may be summarized thus: (1) Use for irrigation purposes by the defendants appears from this petition; such a use by the upper proprietor is reasonable, even if it takes all the water in the stream, as against a lower proprietor who is already using it to propel his mill. (2) The statutes of the state of Nebraska give to the irrigation user priority over the user for manufacturing purposes, and this authorizes a taking of all the water in the stream for irrigation purposes, without regard to the injury that may be caused to lower proprietors, who are already using it for manufacturing purposes. (3) This mill is situated in the state of Kansas, below the point where the stream finally



passes out of the state of Nebraska; and this proprietor outside of the state has no rights in the stream which the legislature of Nebraska must respect or may not authorize Nebraska citizens to disregard. (4) Whatever injury may have happened to the plaintiff, and however perfect his right may be to the water, he has a remedy at law and may not resort to a court of equity to protect it, no matter what the multiplicity of suits which may be thereby rendered necessary at law.

As against these reasons raised by the defendants for refusing to interfere with their use of the water, plaintiff says that it nowhere appears in this petition that defendants are riparian owners, nor that they are taking the water by any right for irrigation or otherwise; that the only allegation on that behalf is that they are taking it out unlawfully and wrongfully and pouring it upon the adjacent land, "where it is absorbed for irrigation purposes," and that, any way, there is and can be no warrant in the laws of Nebraska for such a proceeding; that plaintiff has a vested right under his allegations which could not be taken from him for public purposes without compensation and with which private persons for their own purposes have no right to meddle at all. Plaintiff says that he is asking only for protection to a right as much secured to him by Nebraska laws as if he lived on this side of the state boundary.

It will be seen that the facts in regard to defendants' taking and use of the water do not appear. The only allegation as to that is that they take it out to the extent stated "mainly in the months of June, July and August," and that by "wrongful and unlawful acts," and turn it upon adjacent land, "where it is absorbed for irrigation purposes."

It would seem that the fact of plaintiff's residence beyond the border of this state, and that his mill is located there, ought not to deprive him of any rights which the laws of our state give to a lower riparian owner. Any attempt of our legislature to discriminate against him as compared with resident mill owners would be promptly

declared unconstitutional by the federal courts. Any such determination by the courts would seem to be equally obnoxious to the federal constitution. *Ex parte Virginia*, 100 U. S. 339, 347. It seems clear that the plaintiff should be allowed the same standing as one of our own citizens with a mill on this side of the state line. If he wants more than that, he should have brought his action in some other than a court of this state.

The question then presented on this demurrer is: Does the petition sufficiently disclose a right on plaintiff's part, and a wrong on defendants', to warrant the interposition by injunction which is prayed? The objection that the petition does not sufficiently allege a reasonable use by plaintiff can be upheld only on the theory that no other use is reasonable that interferes with irrigation. The right and reasonableness of use of water power to propel a flouring mill by a riparian owner needs no justification. It has been practiced and protected ever since English law began. The right of plaintiff then must be assumed, unless some stronger claim in defendants appears, or must be assumed.

Was it incumbent on the plaintiff to set out that defendants' claim was by appropriation for irrigation purposes under the Nebraska statute, and negative in advance the existence of such a right? It hardly seems so. The petition sets out a vested right by means of riparian ownership, that such right was in actual use and enjoyment, that without compensation, or tender of compensation, its enjoyment was wrongfully interrupted by defendants. At law this would be sufficient, in default of answer, to warrant the recovery of damages. Why should it not be held sufficient in equity, if the additional facts necessary to confer equity jurisdiction and to warrant an injunction are alleged? It may be granted that the statement that defendants' acts are "wrongful" is a conclusion. It is, however, fairly equivalent to saying they are without right. Is more than such a general negative of defendants' rights required of plaintiff, who sets up the impairment of a clearly recognized right of his own?

It is true that chapter 69, laws 1895, has recognized the appropriation of water for irrigation use as having preference over the use for manufacturing, and of such law this court takes judicial cognizance. It hardly seems, however, that, from an incidental allegation that defendants are wrongfully taking out of the channel and pouring it on the adjacent land, "where it is absorbed for irrigation purposes," we can or should assume that defendants have complied with the law, and have lawfully appropriated the water, and are taking it out under such right.

There seems no doubt that, as defendants' brief reiterates, this state is governed as to water rights by the common law, as modified by statutes. If this plaintiff has set up a right valid at common law, and negatived in general terms the holding of any right by proceedings under the statute on the part of defendants, and without admitting any facts showing such an appropriation by defendants, they should set up such facts if they are relying upon them. The statute giving preference to irrigation rights can only be available to defendants, when the facts showing their rights under it are before the court. Plaintiff has not set them up. He has negatived in general terms their existence. It is hardly probable that the trial court would have sustained any motion to compel plaintiff to set up the particulars of defendants' several claims of right to the water, and negative them specifically in his petition. It does not seem that the trial court should have sustained, or likely that it did sustain, these demurrers because of the lack of such particularity.

It seems that the petition sets out a common law right; that it does not disclose facts on which a defense of the alleged violation of that right can be rested, even if we were to assume that the Nebraska statute could place, and had placed, irrigation rights above mill owners'. It devolved upon the defendants to set up such a defense, if it existed, unless, as defendants claim, the demurrer should have been sustained because of no ground for an injunction, and of that being the only relief specifically

prayed for. It seems probable that this was the ground for the trial court's action.

While the circumstances of this case are somewhat peculiar, the allegations as to the multiplicity of suits seem indisputably sufficient to entitle plaintiff to equitable protection. Not only does the petition allege in general terms the necessity of such interposition of equity, but the specific facts alleged, the number of defendants in this action, the extent of country embraced in their operations, the length of time they have carried them on, the geographical facts which must be judicially recognized, such as the length of the stream and the semi-arid character of the country along its upper course, seem clearly to indicate such a multiplicity of interests as entitled plaintiff to resort to equity. *Shaffer v. Stull*, 32 Neb. 94; *Pohlman v. Evangelical Lutheran Trinity Church*, 60 Neb. 364.

In the case of *Crawford Co. v. Hathaway*, 67 Neb. 325, it is said:

"But where \* \* \* a large number of persons are claiming the right to divert and use the water of a stream, \* \* \* and others as riparian owners whose rights have accrued prior to the statute and have not been divested, we know of no sound reason why a suit in equity to determine and adjust such rights and enjoin interference with those rights by others under a claim of right may not be maintained."

If it be held that a use by defendants for irrigation purposes under a claim of right appears from this petition, then the right to resort to equity follows clearly from the decision in *Crawford Co. v. Hathaway*, *supra*. Surely, if a party on one side of such a controversy, involving many persons and many conflicting interests, may resort to equity for a determination of his rights, one on the other side may, also. The use of the writ of injunction to protect the owner of real estate from an invasion, under eminent domain, of rights for which no compensation has been provided, is well recognized. 1 Lewis, *Eminent Domain* (2d ed.), sec. 265, quoting *East & West R. Co.*

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*v. East Tennessee, V. & G. R. Co.*, 75 Ala. 275. The author says that this is properly referable to the doctrine that equity, for the protection of both parties, will enjoin unauthorized attempts to invade private rights in vindication of an alleged public one, a doctrine distinctly recognized in this state. *Johnson v. Hahn*, 4 Neb. 139; *Schock v. Falls City*, 31 Neb. 599.

There seems no doubt that the allegations of the petition are sufficient to show a right to the water power on plaintiff's part, and, on their face, sufficient to show an interference with that right by defendants. Doubtless, some 200 miles of the river's course lie between these parties plaintiff and defendant, but, if the plaintiff can establish his allegations as to his troubles and their cause, then defendants should either show a right to take away the water, or obtain one, or else let it go down the river channel.

It is recommended that the judgment of the district court be reversed and the cause remanded for further proceedings according to law.

AMES and OLDHAM, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is reversed and the cause remanded for further proceedings according to law.

REVERSED.

The following opinion on rehearing was filed January 18, 1905. *Former judgment of reversal vacated and judgment of district court affirmed:*

1. **Riparian Rights: PETITION: SUFFICIENCY.** In an action by a lower riparian owner to enjoin irrigation corporations and others from diverting water from the stream to the injury of his mill, a petition which alleges that the defendants have been maintaining "dams and ditches and other appliances" upon the stream above his mill for seven years, by means of which they have during that time appropriated stated quantities of water for irrigation purposes, does not state a cause of action without alleging facts

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showing that such appropriation and use of water by defendants is unlawful.

2. **Use of Waters: PETITION TO ENJOIN.** The allegations of the petition being consistent with the lawful use of the water by the defendants, they will be so construed as against the pleader.
3. ———: ———: **ACTION FOR DAMAGES.** Parties who have appropriated water for irrigation purposes pursuant to law, and continued the use of water under such appropriation for more than seven years, can not be enjoined from the continued use of such right by a lower riparian owner whose mill privilege may be injured thereby; his remedy is an action for damages.

**SEDGWICK, J.**

A general demurrer to the petition was sustained by the court below. The character of the action and the principal allegations of the petition are substantially stated in the former opinion. It appears from the petition that it is sought to enjoin a continuation of acts of the defendants, which have been practiced continuously by them from the commencement of the year 1894, more than seven years before this action was begun. The allegations are that there has been a failure of water in the Republican river, at the mill in question, during the summer months of each year during all that time, and that that failure of water and the damage accruing to the plaintiff therefrom, have been occasioned and produced by the acts of the defendants set forth in the petition; a continuation of which acts it is sought to enjoin. There is no allegation in the petition purporting to explain this delay in commencing these proceedings. This leads us to examine what the petition shows in regard to the nature of these alleged wrongful acts, and the position of the respective parties with relation thereto.

Water for the purpose of irrigation is declared by the statute to be a natural want, and the statute also provides that the water of every natural stream is the property of the public, and is dedicated to the use of the people of the state; and those using water for agricultural purposes shall have preference over those using the same for manufacturing purposes. The statute provides a complete sys-

tem under which the right to use the public waters of the state must be obtained, and it defines, fixes and regulates those rights. The state board is given control of the public waters of the state and when, upon the application of an individual to appropriate water for agricultural purposes, the board allows the appropriation and duly adjudicates the right to the use of a certain quantity of water, the party who obtains such right, and appropriates and uses the water thereunder, acquires a vested interest therein. Canals and other works constructed for irrigation or water power purposes are declared to be works of internal improvement, and the right of eminent domain is extended to persons and corporations engaged in the construction of such works. In *Bronson v. Albion Telephone Co.*, 67 Neb. 111, the court, in speaking of enjoining the telephone company from injuring private property in the maintenance of its lines, said:

"We do not think public utilities of this kind ought to be suspended until every abutting owner upon the streets or highways to be used has been duly appeased. If he has been substantially or appreciably injured, an action at law will ordinarily afford him full compensation."

This reasoning applies with greater force to the situation in this case. This, as is stated in the case last cited, is the rule where the construction of a railway causes damage to abutting owners.

"The abutting owners are not made parties to condemnation proceedings, nor can they enjoin construction of the road; but their remedy is in an action at law for damages. *Republican V. R. Co. v. Fellers*, 16 Neb. 169; *Chicago, K. & N. R. Co. v. Hazels*, 26 Neb. 364; *Atchison & N. R. Co. v. Boerner*, 34 Neb. 240. The same remedy is employed where a city, in improving a street, impairs the easement of the abutting owner. *City of Omaha v. Flood*, 57 Neb. 124."

If these defendants had made due application to the state board, and had obtained the adjudication of that board giving them the right to appropriate a given quan-

tity of the public water of the state for irrigation purposes, and, in pursuance of such adjudicated right, had constructed irrigation works, and had, during all that time, actually appropriated and used the amount of water allowed them under such appropriation, in the same manner and to the same extent that they propose to use the water in the future, a lower riparian owner could not enjoin the continued use of such water, but must rely upon his action at law to recover such damages, if any, as he might sustain thereby. We think there can be no doubt of the soundness of this principle.

The important question in this case then is, whether the petition which is demurred to contains allegations which bring the case within the principle above discussed. Upon reexamination of the question we are satisfied that it does. The defendants in the case are Farmers Canal Company, Riverside Canal & Irrigation Company, The Trenton Farmers Irrigation Association, The McCook Irrigation & Water Power Company, and other parties. The petition alleges that all of the defendants, "by reason of dams and ditches, and other appliances, have diverted the waters of the Republican river and its affluents therefrom, poured the same upon the lands adjacent for irrigation purposes, where they have become absorbed"; and it is directly alleged that this action is the cause of the plaintiff's injury. The exact quantity of water that each defendant has diverted, and is diverting, from the stream is stated in the petition.

The plaintiff in an equity case must plead the facts that entitle him to the relief asked. The petition contains no allegation as to the nature and character of the defendant corporations, except those above quoted. Under the rule that the allegations of a pleading must be construed against the pleader, we think that the allegations that these corporations diverted the water from the river and turned it upon adjacent lands for irrigation purposes, and that this is done by them by means of dams and ditches, and other appliances, and that the water is absorbed on these



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lands, and that this has been continued for more than seven years, would require some further allegation from the pleader to show that the existing conditions were such as to entitle him to the injunction asked. The law requires these corporations, before so taking the water for irrigation purposes, to make application to the state board and have their right to do so determined, and the court will not presume that they have not done so in favor of a plaintiff who shows the conditions existing, and fails to show that their use of the water is unlawful. In this view of the proper construction of this petition, the trial court was right in refusing to allow an injunction, and this disposes of the case. We do not find it necessary to examine the other questions discussed by the commissioner in the former opinion, and are not committed to the propositions there advanced.

For the reasons above given, the judgment entered upon the former hearing is vacated, and the judgment of the district court is affirmed.

JUDGMENT ACCORDINGLY.

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**MICHAEL FRANK CLANCY V. GEORGE E. BARKER ET AL.\***

FILED FEBRUARY 4, 1904. No. 13,174.

1. **Innkeepers: DUTIES.** In receiving a guest into his hotel, a hotel keeper impliedly undertakes that such guest shall be treated with due consideration for his comfort and safety.
2. ———: **TRESPASS BY SERVANT: LIABILITY.** A trespass committed upon the guest in the hotel by a servant of the proprietor, whether actively engaged in the discharge of his duties at the time or not, is a breach of such implied undertaking, for which the proprietor is liable in damages.
3. **Admissions by Manager.** It is not within the scope of the authority of a hired manager of a hotel to bind his employer by admissions concerning such trespass after it had been committed.

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\* Rehearing allowed. See opinion, p. 91, *post*.

4. ———. When such admissions are made a day after the trespass, and only remotely connected therewith, they are not admissible in evidence as a part of the *res gesta*.

ERROR to the district court for Douglas county: GUY R. C. READ, JUDGE. *Affirmed as to defendant Barker; reversed as to the other defendants.*

*John O. Yeiser*, for plaintiff in error.

*W. A. Redick and W. J. Connell*, *contra*.

ALBERT, C.

The plaintiff in his petition filed in the district court alleges, in effect, that the defendants were the proprietors and operated a hotel in the city of Omaha; that on the 12th day of January, 1902, he entered such hotel with his wife and infant son for a temporary sojourn therein, whereupon he and the said members of his family were received as guests in said hotel by the defendants; that afterwards, and while they were thus guests in said hotel, the plaintiff's infant son entered a room of the hotel to speak or play with a porter or servant of the defendants, who, at the time, was in said room. Then follow these allegations:

"That the said porter and servant of defendants in said hotel, in said capacity at said time, violated all obligations of hospitality and patience due from said defendants, through said servants, to said infant guest, and the defendants thereby violated their agreement, duty and obligation of law with, and to, the plaintiff by the following conduct, to wit: The said porter, in attempting to have said infant son of plaintiff leave said room and corridor, where defendants did not want him, as instructed, and retire to his mother's room, and to have said infant cease his childish play and pretended annoyance, carelessly, imprudently, rashly, unnecessarily, negligently and foolishly picked up a revolver and pointing it at said infant, said: 'If you handle anything, this is what I will do to

you,' or similar words calculated to frighten the said infant out of his natural and childish playfulness and prevent his touching any of defendants' property, or being about said room or the halls; that the said infant threw up his hands when thus frightened and assaulted, and, by some means unknown to this plaintiff, the said pistol was carelessly and negligently discharged by the said defendants' servant as aforesaid."

The petition contains the usual allegations as to damages.

The defendants by their answers admit that the defendant administrator and corporation were the proprietors of the hotel and were operating it as alleged in the petition; that the plaintiff, his wife and infant son were received into said hotel as guests, at the date alleged in the petition, and that, while the plaintiff and the said members of his family were thus guests at the hotel, the son was seriously injured. But they specifically deny that the person described in the petition as their porter or servant was in their employ at the time the injury occurred, and that he was on duty, or in the performance of any duty, as porter or servant of the defendants at such time. They also specifically deny that the defendant George E. Barker was one of the proprietors of the hotel, or in any way interested in the same, or the operation thereof, save as president of the defendant corporation.

The evidence adduced by the plaintiff sufficiently shows that the plaintiff, his wife and infant son became guests at the hotel, intending to remain but a short time; that about three days after they were received in the hotel, and while they were guests therein, a servant of the proprietors of the hotel, who had waited upon the plaintiff and the members of his family during their stay at the hotel, was playing a harmonica in a room which was not one of those assigned to the plaintiff or any member of his family; that the plaintiff's infant son, attracted by the music, entered the room, the door of which was open; that thereupon the servant who had been playing the

harmonica took up a revolver and pointed it at the boy, saying, "See here, young fellow, if you touch anything, this is what you get." The revolver, by some means, was then discharged, the ball striking the boy, destroying one of his eyes and inflicting upon him other serious injuries. While there is no direct evidence that the person who inflicted the injuries was in the employ of the proprietors of the hotel, the evidence shows that he waited on the guests, carried water to their rooms and rendered such other services as are usually rendered by servants of a certain class about a hotel, and is amply sufficient to warrant a finding that he was the servant of the proprietors, and, for the purposes of this case, would have made him such, perhaps, in the absence of a contract of employment. There is no evidence tending to connect the defendant George E. Barker with the operation of the hotel.

At the close of plaintiff's case the court directed a verdict for the defendants, and from a judgment rendered on such verdict the plaintiff brings the record here for review.

The defendants insist, that the plaintiff having failed to allege that the servant wilfully or maliciously inflicted the injury, it was incumbent on him to show that the injuries were the result of negligence on the part of the servant in the performance of some duty for which he was employed, or in the discharge of some duty which the defendants owed the plaintiff. We think they overlook the theory upon which this action was brought and prosecuted. The plaintiff by his petition and evidence obviously intended to commit himself unreservedly to the theory that his cause of action is *ex contractu*. A contract is alleged in the petition, the wrongful acts of the servant, which resulted in injury to the boy are alleged, not for the purpose of stating a cause of action *ex delicto*, but for the purpose of showing a breach of contract and consequent damages.

This brings us at once to the question, whether the act of the servant, resulting in the injuries complained of, con-

stitutes a breach of the implied contract between the plaintiff and the proprietors of the hotel for the entertainment of the former and his family. By the implied contract between a hotel keeper and his guest, the former undertakes more than merely to furnish the latter with suitable food and lodging. There is implied on his part the further undertaking that the guest shall be treated with due consideration for his safety and comfort. *Rommel v. Schambacher*, 120 Pa. St. 579; *Jencks v. Coleman*, 2 Sumner (U. S. C. C.), 221. In *Commonwealth v. Power*, 7 Met. (Mass.) 596, Shaw, C. J., said:

"An owner of a steamboat or railroad, in this respect, is in a condition somewhat similar to that of an innkeeper, whose premises are open to all guests. Yet he is not only empowered, but he is bound, so to regulate his house, as well with regard to the peace and comfort of his guests, who there seek repose, as to the peace and quiet of the vicinity, as to repress and prohibit all disorderly conduct therein; and of course he has a right, and is bound, to exclude from his premises all disorderly persons, and all persons not conforming to regulations necessary and proper to secure such quiet and good order."

The foregoing language is quoted with approval in *Bass v. Chicago & N. W. R. Co.*, 36 Wis. 450. Substantially the same language is employed by the court in *Dickson v. Waldron*, 135 Ind. 507, 34 N. E. 506. See also *Norcross v. Norcross*, 53 Me. 163; *Pinkerton v. Woodward*, 33 Cal. 557, 585; *Russell v. Fagan*, 7 Houst. (Del.) 389; *Pullman Palace Car Co. v. Lowe*, 28 Neb. 239. The foregoing also show that the duties of a hotel keeper to his guests are regarded as similar to the common law obligation of a common carrier to his passengers. As regards the duty of a common carrier to his passengers, in *Dwinelle v. New York C. & H. R. R. Co.*, 120 N. Y. 117, 127, the court said:

"As we have seen, the defendant owed the plaintiff the duty to transport him to New York, and, during its performance, to care for his comfort and safety. The duty of protecting the personal safety of the passenger and pro-

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moting, by every reasonable means, the accomplishment of his journey is continuous, and embraces other attentions and services than the occasional service required in giving the passenger a seat or some temporary accommodation. Hence, whatever is done by the carrier or its servants which interferes with or injures the health or strength or person of the traveler, or prevents the accomplishment of his journey in the most reasonable and speedy manner, is a violation of the carrier's contract, and he must be held responsible for it."

To the same effect are the following: *Pittsburg, F. W. & C. R. Co. v. Hinds*, 53 Pa. St. 512; *Goddard v. Grand Trunk R. Co.*, 57 Me. 202; *Chamberlain v. Chandler*, 3 Mason (U. S. C. C.), 242; *Pendleton v. Kinsley*, 3 Cliff. (U. S. C. C.) 417; *Bryant v. Rich*, 106 Mass. 180; *Chicago & E. R. Co. v. Flexman*, 103 Ill. 546; *Southern Kansas R. Co. v. Rice*, 38 Kan. 398. An examination of the foregoing cases will show, we think, that the reasoning applies with equal force to a hotel keeper as regards his duties to his guests. Those duties spring from the implied terms of his contract and a failure to discharge them, and while it may in some instances amount to a tort, it amounts in every instance to a breach of contract.

If then the defendants were under a contractual obligation that the plaintiff and his family should be treated with due consideration for their comfort and safety, the act of the servant, resulting in the injuries complained of, obviously amounts to a breach of contract. That the wrongful act was committed by a servant is wholly immaterial. The rule which requires that a guest at a hotel be treated with due consideration for his comfort and safety would be of little value if limited to the proprietor himself. As a rule he does not come in contact with the guests. His undertaking is not that he personally shall treat them with due consideration, but that they shall be so treated while inmates of the hotel as guests; and if they be not thus treated there is a breach of the implied contract, whether the lack of such treatment is the result

of some act or omission of the proprietor himself, or of his servant or servants.

Neither do we deem it material whether the servant, at the time of the injury, was actively engaged in the discharge of his duty as servant or not. He was a servant of the proprietor and an inmate of the hotel; his duty as to the treatment to be accorded the guests of the hotel was a continuing one, and rested upon him wherever, within the hotel, he was brought in contact with them. To hold otherwise would be to say that a guest would have no redress for any manner of indignity received at a hotel, so long as it was inflicted by a servant not actively engaged in the discharge of some duty. The following from *Drinelle v. New York C. & H. R. R. Co.*, 120 N. Y. 117, is peculiarly applicable to this point:

"The idea that the servant of a carrier of persons may, in the intervals between rendering personal services to the passenger for his accommodation, assault the person of the passenger, destroy his consciousness, and disable him from further pursuit of his journey, is not consistent with the duty that the carrier owes to the passenger, and is little less than monstrous. While this general duty rested upon the defendant to protect the person of the passenger during the entire performance of the contract, it signifies but little or nothing whether the servant had or had not completed the temporary or particular service he was performing or had completed the performance of it, when the blow was struck. The blow was given by a servant of the defendant while the defendant was performing its contract to carry safely and to protect the person of the plaintiff, and was a violation of such contract."

It is equally immaterial to this case, we think, whether the shooting was accidental or wilful. The servant in pointing a loaded gun at the boy committed a trespass, and as a result of such trespass inflicted serious and permanent injuries on the child. His acts, therefore, constituted a breach of the implied undertaking of his employers to treat the plaintiff and his family with due consideration for

their safety and comfort, for which breach his employers are liable in damages.

We are aware that there are cases holding contrary to the foregoing conclusion, but they do not seem to us to be based on sound reasons, nor upon just considerations of public policy, and are contrary to the weight and trend of modern authority.

The plaintiff offered to prove by one of his witnesses that the day following the accident one Mr. Bowman, the manager of the hotel, told the witness "that he had told the boys (referring to the porters and bellboys of the hotel) time and again to keep the kid (meaning the plaintiff's son) out of the elevator, halls and rooms of the hotel, and to keep him in his mother's room." The offer was rejected, and the plaintiff contends that the ruling of the court in that behalf is erroneous. We do not think so. It was not within the scope of the authority of the manager to bind his employer by the admission or declaration sought to be proved, and it was too remote in point of time and too detached from the injury to be admissible as a part of the *res gestæ*. *Gale Sulky Harrow Co. v. Laughlin*, 31 Neb. 103; *Commercial Nat. Bank v. Brill*, 37 Neb. 626; *Collins v. State*, 46 Neb. 37; *City of Friend v. Burleigh*, 53 Neb. 674.

As to the defendant George E. Barker, as we have seen, there is no evidence which would warrant a verdict against him. Hence, so far as he is concerned, the judgment of the district court is right, but as to the other defendants it is recommended that the judgment be reversed and the cause remanded for further proceedings according to law.

BARNES and GLANVILLE, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court, as to the defendant George E. Barker, is affirmed and, as to the other defendants, the judgment is reversed and the cause remanded for further proceedings according to law.

JUDGMENT ACCORDINGLY.



The following opinion on rehearing was filed May 3, 1905. *Former judgment adhered to.* BARNES, J., *dissenting*:

1. **Master and Servant: TORTS OF SERVANT.** The relation of master and servant does not render the master liable for the torts of the servant, unless connected with his duties as such servant or within the scope of his employment.
2. **Innkeepers: ASSAULT BY SERVANT: LIABILITY.** It is the duty of a hotel keeper to protect his guests while in his hotel against the assaults of employees who assist in the conduct of the hotel and in the care and accommodation of the guests. If damages result from such assault the hotel keeper is liable therefor.

SEDGWICK, J.

Since the filing of the former opinion in this case, *ante*, p. 83, the question principally discussed therein, and arising out of the same transaction, has been decided by the United States court of appeals for this circuit, *Clancy v. Barker*, 131 Fed. 161. The opinion of that court prepared by Judge Sanborn strongly states the reasons which led the majority of the court to the conclusion that the hotel company ought not to be held liable. In a dissenting opinion Judge Thayer upholds the views expressed in the former opinion of this court.

1. The first ground urged by counsel for holding the defendant liable we think is satisfactorily discussed in the majority opinion of that court. This relates to the doctrine of *respondeat superior* derived from the relation of master and servant. If there had been evidence showing that it was the duty of the employees of the hotel to prevent children from entering and playing in rooms which were not assigned to them, it might perhaps be contended that the boy Lacy was acting within the scope of his employment when the accident occurred. The evidence offered as tending to show that he was so acting was properly excluded, as shown in the former opinion, and it does not appear that there was any other evidence in the record upon this point.

2. Whether the relation that exists between a keeper of a hotel and his guests makes the former liable for any misconduct of his employees, by which his guests are injured while they are in the hotel and are in his care, is a more difficult question. It is admitted that common carriers under such circumstances are liable. It is said that the reason for this is that the passenger places himself in the care of the employees of the carrier, and is continually in their care, so that whatever they do while the passenger is being transported is within the scope of their employment. The hotel keeper is also bound to bestow reasonable care for the safety and comfort of his guests. He is not an insurer of his guests; but neither is the carrier an insurer of his passengers. The carrier of course is bound to use extraordinary care or, as is sometimes said, the utmost care for the safety of his passengers. The business engaged in is a dangerous one and the care should be in proportion to the danger that exists. In this respect there is a difference between the two situations, but both perform public duties, and are bound to serve any individual who requires their service and suitably applies for it. The hotel keeper offers accommodations for strangers who are not acquainted with his employees and who have no voice in their selection. He undertakes to provide them with suitable accommodations and with at least a certain degree of care for their comfort and safety. He has some control over their persons and conduct. He must not allow such conduct on their part as will interfere with the reasonable hospitality which he owes to other guests. It may be that the carrier has greater control over the persons and conduct of passengers, but this idea seems to be exaggerated in some of the opinions. In what sense does the porter of a sleeping car have charge of the occupants of the car and have control of their conduct and behavior? Surely, if it is different in degree from the control that the hotel keeper has over his guests, it is not much different in kind. The hotel keeper is under obligation to protect his guests from danger when it is reasonably within his power to do so;

and is under obligation to select such employees as will look after the safety and comfort of his guests, and will not commit acts of violence against them so far as is reasonable within his power. It would seem that to relieve him from liability for injuries done to his guests by his employee, upon the sole ground that the employee was not then in the active discharge of some specific duty in connection with his employment, and hold the carrier responsible under similar conditions, is making a fine distinction. The liability of a common carrier under such circumstances is a doctrine of modern growth. There does not appear to be reason for establishing such doctrine that would not equally apply under modern conditions to the relations between an innkeeper and his guests.

Notwithstanding the great respect due to the court which has reached a contrary conclusion in *Clancy v. Barker*, *supra*, we conclude that our former decision ought to be adhered to.

FORMER JUDGMENT ADHERED TO.

BARNES, J., dissenting.

In this case I find myself unable to concur in the majority opinion, which adheres to our former decision. While I concurred in that decision when it was rendered, on a reexamination of the question as presented on the rehearing, I am convinced that the defendant should not be held liable. The facts which are the basis of the plaintiff's cause of action, briefly stated, are as follows: The plaintiff, Michael F. Clancy and his wife, with their infant son Freeman, who was about six years old, were stopping at the Barker hotel in the city of Omaha, and had been guests at the hotel for several days prior to the accident complained of. About 8:30 o'clock of the evening of January 15, 1902, Freeman left his mother's room and went down the elevator to the first floor of the hotel, as he says, "To get some ice water." Reaching that floor, he passed by a room where a boy of the name of Lacy, who was employed as a porter

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or bellboy at the hotel, was playing a harmonica; the door being ajar he entered this room, apparently to satisfy his childish curiosity; another boy, who sometimes ran the elevator, was also in the room; both of these employees seem to have been off duty at the time, and engaged in amusing themselves in a room not occupied by any of the guests of the house. As the Clancy boy entered the room, young Lacy said to him, apparently in jest, "See here, young fellow, if you touch anything, this is what you get," at the same time pointing a pistol at him. The pistol was at that instant accidentally discharged, the ball striking the boy Freeman in the head, destroying one of his eyes and inflicting other injuries upon him which, however, did not prove fatal; and this action was brought by the father to recover damages alleged to have been sustained by him by reason of these facts.

The prevailing opinion does not place the right of recovery in this case on the ground of negligence or tort, for no negligence on the part of the defendants is alleged or proved; but bases such right solely on an alleged breach of the implied contract of an innkeeper that his guest shall be treated with due consideration for his comfort and safety; and so holds the proprietors of the hotel liable to both the father and his infant son for the damages sustained by them.

It must be conceded that, until recent years, the whole trend of authority supported and adhered to the common law rule that an innkeeper is not an insurer of the safety of his guest against injury, and that his obligation is limited to the exercise of reasonable care for the safety, comfort and entertainment of his visitor. *Calye's case*, 8 Rep. (4 Coke) 32; *Sandys v. Florence*, 47 L. J. C. P. 598; *Weeks v. McNulty*, 101 Tenn. 495; *Curtis v. Dinneen*, 4 Dak. 245; *Sheffer v. Willoughby*, 163 Ill. 518; *Gilbert v. Hoffman*, 66 Ia. 205; *Overstreet v. Moser*, 88 Mo. App. 72; *Stanley v. Bircher*, 78 Mo. 245; *Stott v. Churchill*, 15 Misc. (N. Y.) 80, 36 N. Y. Supp. 476; *Sneed v. Moorehead*, 70 Miss. 690. It is claimed, however, that the more recent

cases have changed the rule, and to support this view we are referred, in the original opinion, to *Rommel v. Schambacher*, 120 Pa. St. 579. In that case it appears that on the evening of the 9th of August, 1884, the plaintiff, William Rommel, a minor, entered the tavern of Jacob Schambacher, and there found one Edward Flanagan; they both became intoxicated on the liquor furnished them by Schambacher. While the plaintiff was standing outside of the bar, engaged in conversation with the defendant, Flanagan pinned a piece of paper to his back and set it on fire. The consequence was that Rommel's clothes were soon in flames, and before they could be extinguished he was badly injured. On those facts it was held that the proprietor of a saloon is liable for injuries sustained by one who enters therein and becomes intoxicated, by reason of another, who also became intoxicated there, and who, in full view of the proprietor, attached a piece of paper to the former and set it on fire.

The sole ground of holding the proprietor liable was that he furnished the liquor which caused the intoxication of the two men, and allowed one of them, in his presence, to attach the paper to the other and set it on fire, when he could, and should, have prevented it. So it will be seen that there is nothing in the facts of that case, or in the matter actually decided, which supports the prevailing opinion.

Our attention is also called to the case of *Commonwealth v. Power*, 7 Met. (Mass.) 596, in which Shaw, C. J., said:

"An owner of a steamboat or railroad, in this respect, is in a condition somewhat similar to that of an innkeeper, whose premises are open to all guests. Yet he is not only empowered, but he is bound, to so regulate his house, as well with regard to the peace and comfort of his guests, who there seek repose, as to the peace and quiet of the vicinity, as to repress and prohibit all disorderly conduct therein; and of course he has a right, and is bound, to exclude from his premises all disorderly persons, and all

persons not conforming to regulations necessary and proper to such quiet and good order."

This language, it seems to me, comes far short of justifying the conclusion announced by the majority.

The case of *Dickson v. Waldron*, 135 Ind. 507, is also cited to sustain the prevailing opinion. The facts in that case were: George A. Dickson and others were lessees and managers of the Park theater in the city of Indianapolis; Waldron came to the box office of the theater and applied for a 10-cent ticket, giving the ticket seller, one Joseph Gordon, a silver dollar, and receiving from him his ticket and only seventy cents in change; one John Dickson was in the box office at the time with the ticket seller, and was in charge of and conducting the theater for and on behalf of the lessees. Waldron demanded of the ticket seller the right change; an altercation ensued; and the janitor of the theater, who was also a special policeman, was ordered by Dickson, who had reached through the window and grabbed Waldron and slapped him in the face, to arrest Waldron for a "vag." The janitor thereupon struck Waldron, knocked him down and beat him severely; some one interfered, and the janitor withdrew; then Gordon came out of the ticket office and, in the presence of the manager, assaulted Waldron and beat him shamefully; thereafter the janitor arrested Waldron and took him to the police station. On these facts it was held, as in *Rommel v. Schambacher*, *supra*, that the proprietor of the theater was liable for the injuries sustained by Waldron.

In the foregoing cases, and in some others, the courts have made use of the expression, "The liability of an innkeeper is like that of a common carrier." But it is nowhere held that the kind and extent of the liability of the innkeeper is the same as that of a common carrier. All of the other cases referred to are actions where common carriers were sued for injuries to passengers while being transported.

Our attention was also called, on the rehearing, to the case of *Curran v. Olson*, 88 Minn. 307, as sustaining plain-

tiff's contention. That was a case where a patron of a saloon fell asleep in his chair and a third person poured alcohol, which was furnished by the bartender in charge of the defendant's business, on the foot of the sleeper and set it on fire. The saloon keeper was held liable because the tort was committed in the presence and with the assent of his managing agent, when it was the duty and within the power of the agent to have prevented it. So, it seems to me, that in none of the cases to which our attention has been directed are the facts the same, or similar, to those in the case at bar, and I am of opinion that none of them fairly support the rule announced by the majority. On the other hand, I believe the great weight of authority to be with the defendants, and that the rule that an innkeeper is not an insurer of the safety of the person of his guest against injuries, and that his contract obligation is limited to the exercise of reasonable care for the safety, comfort and entertainment of his visitors, should be adhered to. While my associates state that they do not intend to make the innkeeper an insurer of the safety of the guest, it seems clear to me that such is the effect of the prevailing opinion.

The case of *Clancy v. Barker*, 131 Fed. 161, which was an action for the infant Freeman Clancy, by the plaintiff herein, as his next friend, to recover for his injuries occasioned by the accident, which is the basis of this action, is commented on by the majority, and I take this occasion to review it. It was there held by the United States circuit court of appeals that the defendants were not liable. The plaintiff's contention there was the same as here, and Judge Sanborn, who wrote the prevailing opinion, said:

"The crucial question here, therefore, is whether or not an innkeeper is an insurer of the safety of the person of his guest while the latter remains in his hotel against the negligent and wilful acts of his servants, when they are acting without the course and without the actual or apparent scope of their employment. \* \* \* Counsel for the plaintiff insists that the liability of the innkeepers should be extended in the case at bar even beyond that of

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common carriers, so that the defendants should be held liable for the injuries inflicted by the wilful or careless act of their servant when he was not acting within the course or scope of his employment. The argument in support of this contention is that common carriers are liable for the negligent or wilful acts of their servants to whom they intrust the care, custody, and control of the passengers they transport, and that the liability of innkeepers to their guests is similar to that of carriers to their passengers. There are many reasons, however, why this argument is not persuasive, and why it fails to demonstrate that an innkeeper insures the safety of the persons of his guests against injuries inflicted by his servants when they are not engaged in the discharge of their duties as employees. \* \* \* There is a marked difference in the character of the contracts of carriage on a railroad or steamboat and of entertainment at an inn, and a wide difference in the relations of the parties to these contracts. In the former, the carrier takes and the passenger surrenders to him the control and dominion of his person, and the chief, nay, practically the only, occupation of both parties is the performance of the contract of carriage. For the time being all other occupations are subordinate to the transportation. The carrier regulates the movements of the passenger, assigns him his seat or berth, and determines when, how, and where he shall ride, eat, and sleep, while the passenger submits to the rules, regulations, and directions of the carrier, and is transported in the manner the latter directs. The contract is that the passenger will surrender the direction and dominion of his person to the servants of the carrier, to be transported in the car, seat, or berth and in the manner in which they direct, and that the latter will take charge of and transport the person of the passenger safely. The logical and necessary result of this relation of the parties is that every servant of the carrier who is employed in assisting to transport the passenger safely, every conductor, brakeman, and porter who is employed to assist in the trans-



portation, is constantly acting within the scope and course of his employment while he is upon the train or boat, because he is one of those selected by his master and placed in charge of the person of the passenger to safely transport him to his destination. Any negligent or wilful act of such a servant which inflicts injury upon the passenger is necessarily a breach of the master's contract of safe carriage, and for it the latter must respond. But the contract of an innkeeper with his guest, and their relations to each other, are not of this character. The innkeeper does not take, nor does the guest surrender, the control or dominion of the latter's person. The performance of the contract of entertainment is not the chief occupation of the parties, but it is subordinate to the ordinary business or pleasure of the guest. The innkeeper assigns a room to his guest, but neither he nor his servants direct him when or how he shall occupy it. \* \* \* The agreement is not that the guest shall surrender the control of his person and action to the servants of the innkeeper, in order that he may be protected from injury and entertained. It is that the guest may retain the direction of his own action, that he may enjoy the entertainment offered, and that the innkeeper will exercise ordinary care to provide for his comfort and safety. \* \* \* The natural and logical result of this relation of the parties is that when the servants are not engaged in the course or scope of their employment, although they may be present in the hotel, they are not performing their master's contract, and he is not liable for their negligent or wilful acts."

An examination of the cases involving the liability of common carriers, of owners of palace cars, of steamboats, and of theaters, cited in the prevailing opinion, discloses that the defendants' servants in every case were acting within the course or scope of their employment, and none of them hold the defendants liable for the wilful or negligent acts of their employees beyond that scope. I am much impressed with the prevailing opinion of Judge

Sanborn. The reasoning employed by him appears to be sound and is supported by the great weight of authority in both England and this country; and while I do not consider myself bound by that opinion, yet it seems to me to announce the better rule. I regret that different courts should arrive at different and inconsistent conclusions from the same facts, and practically in the same case.

Again, the supreme court of Dakota in *Curtis v. Dinneen, supra*, directly decided a similar question to the one presented in this case in accordance with the general rule, and in favor of the innkeeper. In that case the plaintiff, while a guest at the defendant's hotel, was assaulted by the defendant's husband, who was employed in and about the house, but not in the course of his employment. The court said:

"It is doubtless good legal doctrine that a master is liable to answer in a civil action for the tortious or wrongful act of his servant if done in the course of his employment in the master's service, even though the master did not know of or authorize such act, or may have disapproved of or forbidden it. The act must be done in the execution of the authority given by the master and in pursuit of the master's business, and must be within the scope of the servant's employment, or, unless it be ratified by the master, he (the master) will not be liable therefor."

And so it was held that an innkeeper is not liable for assault and battery committed on a guest by one of his servants, where the assault was not within the line of the servant's duty, and was not advised or countenanced by the master.

In a still later case, *Rahmel v. Lehdorff*, 142 Cal. 681, the supreme court of California, in a well considered opinion, held that an assault by a waiter in a hotel on a guest is not within the scope of the waiter's employment, or within the real or supposed scope of his duties so as to render the innkeeper liable for the tort. An innkeeper is not bound to protect his guests from acts of violence of

his servants, in the absence of negligence in employing a violent or disorderly person.

To my mind there are many other reasons why the contractual liability of innkeepers to their guests should not be held to be coextensive with, and the same as that of common carriers to their passengers. The agencies employed by common carriers to transport their passengers are extremely hazardous, and are not in any manner under the control of the passenger himself. They are used and controlled wholly by the servants of the carrier in transporting the passenger to his place of destination. During every moment of his journey he is in charge and under the control of the employees of the carrier, and so the carrier is held liable for the slightest negligence; while one who is the guest of the modern hotel or inn has the utmost freedom of movement; there is no danger or hazard connected with the business, and when a room is assigned to the guest it is his own to occupy or not, as he pleases; it is his domicile, from which he may exclude all intruders; and when, as in many cases, the guest lives constantly at the hotel, it is his home from which he may depart and to which he may return at any time, and at all hours of both day and night. Again, there are at all times other guests of the house with whom he necessarily is thrown in contact, and from whom he may possibly receive an injury; and it is believed that our former opinion goes to the extent of holding the proprietor of the hotel liable for such injuries, without any negligence on his part. The modern hotel is, to a certain extent, a public place. Any one may enter it for any lawful purpose, without the consent of the proprietor, and leave it without let or hindrance; and yet the effect of the prevailing opinion is that, for any injury inflicted by such a person to a guest of the house, the innkeeper would be liable, even if he had no reason to expect it, and could not in any way have prevented it. It seems clear to my mind that an ordinary nonhazardous and useful occupation should not be required to bear such an extraordinary burden.

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Again, the thought intrudes itself, that the person injured in this case was an infant of such tender years that the defendants had the right to expect that its parents, who in reality were their guests, would prevent him from entering the rooms of the servants or other guests, or getting into places of danger; in other words, from roaming about the hotel at will, and unattended. It can hardly be said that the proprietors, knowing that the child was with his mother, and under her immediate care and control, impliedly contracted to relieve her of that duty, assume it themselves, and insure him against injury while in their hotel.

After mature reflection and a careful examination of the authorities, I am of opinion that the defendants should not be held liable for the injury complained of.

For the foregoing reasons, it seems clear to me that our former opinion should be vacated, and the judgment of the district court should be affirmed.

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JOSEPH S. HOAGLAND ET AL. V. MARTHA E. STEWART.\*

FILED FEBRUARY 4, 1904. No. 13,144.

**Decree:** REVERSAL: DISCRETION OF TRIAL COURT. Where the judgment of this court upon appeal in an equity case reverses the judgment of the trial court and remands the cause, but gives no further direction, the trial court is reinvested with discretion to proceed therein as furtherance of justice may require, and, unless such discretion is abused, its action will be sustained.

ERROR to the district court for Logan county: HANSON M. GRIMES, JUDGE. *Affirmed.*

*W. V. Hoagland*, for plaintiffs in error.

*Wilcox & Halligan* and *Strode & Strode*, contra.

GLANVILLE, C.

The defendant in error brought suit in Logan county

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\* Rehearing denied. See opinion, p. 106, *post*.

against the plaintiffs in error to foreclose a real estate mortgage on certain property, and secured a decree in her favor on the 16th day of May, 1900. An appeal was taken to this court, and the judgment reversed by an opinion prepared by the commissioners, which is found in 3 Neb. (Unof.) 142. The recommendation of the commissioners is as follows: "It is therefore recommended that the judgment of the district court be reversed and the cause remanded." The action of the court thereon is embodied in the following language: "The conclusions reached by the commissioners are approved and, it appearing that the adoption of the recommendations made will result in a right decision of the cause, it is ordered that the judgment of the district court be reversed and the cause remanded." The plaintiffs in error, after mandate was filed in the district court, filed a motion therein asking judgment of dismissal. They also objected to the action of the district court in proceeding to a retrial of the cause, contending that, after the action of the supreme court upon their appeal, the district court had no jurisdiction to pursue any course in the proceeding other than to dismiss the action. Their motion and objections were overruled, and the court proceeded to try and determine the cause. Motion for a new trial was filed and overruled, and a petition in error filed herein. Numerous assignments of error are made, but there is no bill of exceptions, and the only question to be passed upon by this court is, whether it affirmatively appears that the trial court erred in proceeding to a trial of the cause. The contention of plaintiffs in error is based upon the following language contained in the commissioners' opinion heretofore referred to: "Upon this record the only judgment the district court could properly have rendered is one of dismissal. By section 594 of the code, this court is directed 'to render such judgment as the court below should have rendered, or remand the cause to the court below for such judgment.'"

In the opinion above referred to, the parties are designated as plaintiffs in error and defendant in error, and

section 594 of the code which prescribes a rule of action in this court upon proceedings in error is quoted. This section constituted section 594 of title 16 of the territorial civil code of Nebraska (Revised Statutes, 1867), entitled "Error in Civil Cases." Title 21 of that code is, "Appeals from the district to the supreme court," and section 683 therein provided, "The court may reverse or affirm the judgment, or render such judgment as the district court should have done." The provisions of this title are held to have fallen with the repeal of the chancery act (see *Irwin v. Calhoun & Crowton*, 3 Neb. 453), and section 683 is no longer found in our code, but the distinction between cases brought to this court upon error and appeal still exists. When the legislature again provided for appeal in equity cases, it did not make the sections governing procedure upon error applicable thereto, and we know of no rule of practice provided by statute, or established by this court, which prevents it from simply reversing or affirming the judgment of the lower court, or as an alternative, rendering such judgment as the district court should have rendered. The judgment of this court upon the appeal referred to might have been a formal judgment in favor of the defendant in the action, if in the opinion of the court such was the proper judgment to enter, but instead of rendering such judgment, the court had the power simply to reverse the judgment of the lower court and remand the cause without further direction, and that it did. In *Faulkner v. Simms*, 68 Neb. 299, this court said: "We may say, however, that the former trial is unsatisfactory in every way. There were no pleadings, but only stipulations, after trial, as to what was regarded as in issue. There was no examination of witnesses, but instead there were stipulations as to what they would testify. The main contest was upon other points, and between other parties. We should hesitate, therefore, to recommend the entry or direction of a final order upon such a record. In furtherance of justice, where a finding is set aside on appeal, and the former trial was unsatisfactory,

instead of entering or directing a new decree, this court will remand the cause for further proceedings. This course was followed in *Topping v. Jeanette*, 64 Neb. 834, and upon motion for a rehearing, in *Gilbert v. Garber*, 62 Neb. 464. We think it should be taken in the case at bar. Upon a new trial, the question will doubtless be settled by satisfactory evidence adduced by the one party or the other." In *Topping v. Jeanette*, *supra*, it is said: "We are of opinion that the finding and decree are contrary to the evidence, and should be set aside. The ordinary course would be to render a new decree or to direct a decree for plaintiff in the district court. But we are not entirely satisfied with the former trial, and as it appears that a foreclosure suit is now pending, in which case, or on a new trial of this one, or upon consolidation, as the parties may be advised, the facts may be fully developed, we think the interests of justice would be subserved by remanding this cause for further proceedings only. Such course has been adopted frequently under like circumstances. *Clemons v. Heelan*, 52 Neb. 287; *Medland v. Linton*, 60 Neb. 249; *Nebraska Moline Plow Co. v. Fuehring*, 60 Neb. 316. We therefore recommend that the decree be reversed and the cause remanded for further proceedings."

This case was before the lower court without direction as to what steps it should take as a court of equity in the premises, and we are clearly of the opinion that, after its judgment in favor of the plaintiff in the action was reversed, the trial court had power, in the furtherance of justice, to allow a retrial of the issues made by the pleadings. It is not uncommon for courts to allow a party, either plaintiff or defendant, to withdraw a rest and proceed with further evidence. We think the trial court had discretion to do so in this case, notwithstanding anything contained in the judgment of this court. There is nothing in the record to indicate upon what application or showing the trial court based its action, and we can not say that it abused its discretion in pursuing the course it did. If the court had a right to exercise such discretion, then,

in reviewing its action upon a petition in error, it must affirmatively appear that it abused such discretion, or its action will be sustained. No abuse of discretion appears.

We therefore recommend that the judgment of the district court be affirmed.

By the Court: The conclusions announced in the foregoing opinion are approved, and it appearing that the adoption of the recommendation made will result in a right determination of the cause, it is ordered that the judgment of the district court be

**AFFIRMED.**

The following opinion on motion for rehearing was filed June 9, 1904. *Rehearing denied:*

1. **Decree: REVERSAL: PROCEDURE IN DISTRICT COURT.** The rule of this court is that, when a decree in equity is reversed and remanded generally without specific instructions, the lower court is to exercise its discretion in the further disposition of the case, in accordance with the judgment of this court and the law of the case as expressed in the opinion.
2. **Commissioners' Opinions.** An unofficial opinion of a court commissioner is not the opinion of the court. The conclusion reached is approved, and the recommendation adopted. The law of the case is to be derived from the judgment of the court, and the questions necessarily determined thereby.

**SEDGWICK, J.**

Upon this motion for rehearing, it is urged that the opinion upon which the decree of the district court was reversed, when the cause was here upon the first appeal, must be looked to and construed in determining the effect of the judgment of reversal then entered. The position can not be maintained, because the opinion was not made official; the reasons for reversal given by the commissioner were not adopted by the court; the conclusion only was approved. By the judgment entered, the decree of the dis-



strict court was reversed and the cause remanded generally, without specific instructions. The reasons for not approving the language of the commissioner's opinion are manifest. From the record of the trial in the district court, it appeared that the action was an ordinary one for the foreclosure of a real estate mortgage. The original notes had been lost. The plaintiff undertook to make proof with copies. Foundation was laid for the introduction in evidence of the copies in place of the lost notes. This foundation was held sufficient by the trial court, and the copies were received in evidence. This court found the foundation for secondary evidence to have been technically insufficient, and so reversed the decree of the district court. The question of the existence and validity of the notes and mortgage had not been investigated and was not passed upon by this court.

The rule of practice of some courts is that, in reversing a decree in equity of a lower court, the appellate court will give specific instructions to that effect if the condition of the case requires a further hearing in the lower court; and, if no such specific instructions are given, the trial court has no authority to further investigate the merits of the case. The rule of this court is that, unless a decree is entered in this court, or specific instructions are given, that is, when the case is reversed and remanded generally, the district court is to exercise its discretion in the further disposition of the case, consistent, of course, with the judgment of this court and the law of the case as expressed in the opinion. *Gadsden v. Thrush*, 72 Neb.

1. An unofficial opinion of a commissioner is not the opinion of the court. The law of the case, then, is to be derived from the judgment of the court, and the questions of law necessarily involved in the conclusion reached. Upon the first appeal the court adopted the recommendation of the commissioner, reversed the decree of the district court, and remanded the cause generally, without specific instructions. This left it to the discretion of the trial court to take such further proceedings as justice and

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equity required. We are satisfied that the trial court did not abuse that discretion.

The motion for rehearing is overruled.

REHEARING DENIED.

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CURTIS W. RIBBLE, ADMINISTRATOR, v. NETTIE FURMIN.

FILED FEBRUARY 4, 1904. No. 13,175.

1. Appeal: FINAL ORDER. An order of a county court refusing an application to file a claim against an estate, because presented after the expiration of the time allowed for presenting claims, is a final order from which an appeal to the district court will lie.
2. Estates: CLAIMS: TIME OF FILING. Upon such an appeal it appeared from the pleadings that the notice of the expiration of the time for presenting claims was published prior to making the order fixing such time. *Held*, That claimant is entitled to an order allowing her claim to be filed and directing a hearing thereon.
3. Order: EVIDENCE. *Held*, also, that such an order is clearly justified by the evidence.
4. Jury Trial. In a hearing upon such an appeal neither party is entitled to a jury trial.
5. Appeal: PROCEDURE. A judgment of the district court upon such an appeal, remanding the cause to the county court with direction to "permit the filing of the claim and to set a day for hearing, and to proceed to hear and pass upon the same," is not the proper judgment, but a hearing in the district court on such claim should be had in the same manner as though the appeal had been from an order disallowing the claim upon hearing before the county court.

ERROR to the district court for Saline county: GEORGE W. STUBBS, JUDGE. *Reversed with instructions.*

*A. S. Sands and L. W. Colby, for plaintiff in error.*

*George H. Hastings and Robert Ryan, contra.*

GLANVILLE, C.

This is a proceeding in error seeking to reverse a judgment of the district court for Saline county, and was

argued and submitted with the two following cases, Curtis W. Ribble against Laura A. Ames, and the same plaintiff in error against Mary Hopkinson; and, the questions involved being identical the decision in this case will govern the other two. The judgment of the district court sought to be reversed was rendered in an action or cause appealed from the county court of that county, wherein the defendant in error was refused leave to file her claim, based upon a promissory note, against the estate of James M. Bullion, deceased. The district court heard the matter upon appeal and rendered the following judgment or order:

"It is therefore considered and ordered by the court; that the order of the county court be reversed, and the county court ordered to permit the filing of the claims and to set a day for hearing, and to proceed to hear and pass upon the claims."

Contention was made by the defendant in error, in this court, that the order in question was not a final order or judgment which could be reviewed upon error, and a ruling was made adverse to such contention by an opinion found in 69 Neb. 38. By the petition filed in the district court, upon which the cause was tried, it was alleged that one Sophy Bullion, widow of the deceased, was appointed special administratrix of his estate on the 15th day of January, 1901; that the defendant in error is a resident of the state of New York, and absent from the state of Nebraska; that on the 19th day of February, 1901, an order was made by the county court, providing that all claims should be filed against said estate on or before August 22, 1901; that the first publication of notice of the expiration of the time for filing claims was made on the 28th day of January, 1901, and the last on the 6th day of February, 1901, and that on the 12th day of April, 1901, the said Sophy Bullion was duly appointed as administratrix of said estate, and duly qualified. The petitioner then sets up an apparently valid claim against the estate upon a promissory note.

It seems that Sophy Bullion died pending the action, and that the plaintiff in error was appointed by the court as her successor, and has been substituted as administrator in her stead in these proceedings. His answer admits the appointment of a special administratrix; the making of the order requiring claims to be filed against such estate on or before August 22; and alleges the giving of due notice of the time for filing claims, by publication in a newspaper "more than six months prior to the time limited for the filing and barring of claims." By his pleadings he also raises the issue that an appeal would not lie from the decision of the county court in this regard, claiming that the same was entirely discretionary with the county court, and could be reviewed only upon error.

He now contends that the pleadings and evidence are not sufficient to sustain the judgment of the district court. We are of the opinion that in the condition of the pleadings, as above shown, the defendant in error was clearly entitled to file her claim against the estate at the time the same was presented to the county court in September, 1901. It will be noticed that in the petition it is alleged that the notice of the expiration of the time for filing claims was published before the order fixing such time was made, and that the answer alleged that it was given more than six months prior to August 22, which would also be before the date of the order. Section 214, chapter 23 of our statutes (Annotated Statutes, 5079), requires the commissioners appointed to examine claims against estates to give notice of the time limited for filing claims, within 60 days after their appointment, and that, in case the court shall examine such claims, the same notice must be given. It appears by both petition and answer that the notice in the case before us was made by publication prior to the date of the order. Such notice is a nullity, and the time for filing claims was not limited by the order of the court without publication after the order was made. The defendant in error had a right to file her

claim, and have the same examined at the time it was presented, and the judgment of the district court granting such right is clearly justified.

An examination of the evidence contained in the bill of exceptions leads us, also, to the conclusion that the defendant in error should have been allowed to file her claim when it was presented, even if the order of the county court limiting the time, made before the appointment of the general administrator, was valid, and due notice as required by law had been given. She was a nonresident of the state, and absent therefrom, and her claim, with the note, had been placed in the hands of William G. Hastings, who appeared for her on February 18, 1901, filing objections to the appointment of the widow, Sophy Bullion, as general administratrix. A hearing upon such objections was continued, and her appointment and qualification took place on the 17th day of April, 1901. Before that time her attorney, William G. Hastings, was appointed supreme court commissioner by this court, and, of course, ceased to practice as an attorney in the courts of this state. He omitted to turn the matter over to another attorney until in September of that year, and we think the entire evidence justifies the district court in holding that she should be allowed to file her claim, and have the same examined and passed upon.

While there are many assignments in the petition filed by plaintiff in error, but few are noticed in his brief, in which he says:

"Counsel will content themselves with referring the court, solely, to the deficiency of the evidence in the matter of the claimant's excuse for not presenting the claim within the time limited by the county court. It is submitted that no reasonable excuse whatever is given. It was pure and simple neglect, dilatoriness or carelessness on the part of claimant and her attorneys. The evidence shows that neither the applicant nor her attorneys were free from laches; that neither of them exercised common, ordinary diligence. If the evidence was the same before

the county court, there can be no question but what sound discretion was exercised in refusing to extend the time. However, the whole matter comes back to the first proposition, that the order of the county court, in refusing to extend the time to present claims, is not an appealable order, but rests in the sound discretion of the court, and can only be reviewed by proceedings in error."

We think the discretion in the county court in such a matter is the same kind of discretion a court of equity has in an action for specific performance of contracts, and is not to be arbitrarily exercised, but the court must, under section 218, chapter 23, Compiled Statutes (Annotated Statutes, 5083), extend the time as the circumstances of the case may require, when proper and timely application and showing are made. An order denying the claimant the right to file a claim is certainly a final order, from which an appeal lies from the county court to the district court under section 42, chapter 20, Compiled Statutes (Annotated Statutes, 4823).

Contention is made that a jury trial of the issue joined, as to the right to file the claim, should have been allowed. The matter was for the court to decide, and the right to a jury trial upon a hearing as to the validity of the claim may still be insisted upon, and is all that plaintiff in error is entitled to in that regard.

It is contended by the defendant in error that, under section 214, chapter 23, above referred to, no order could be made limiting the time for filing claims during the pendency of a special administration, but it will be noticed that such section reads, in part, "When letters \* \* \* of special administration shall be granted by any probate court, or during any appeal from said order, it shall be the duty of the probate judge to receive, examine, adjust and allow all claims and demands of all persons against the deceased, giving the same notice as is required to be given by the commissioners in this subdivision." It would seem, therefore, that the county judge might proceed to give notice and hear claims without waiting for the ap-

pointment of a general administrator, in which case, parties interested in the estate would have the same right to contest claims, and appeal from their allowance, as after such appointment. The right of an interested party to appeal from the allowance of a claim is not dependent upon the failure of the executor or administrator to appeal, since the enactment of section 42, chapter 20, *supra*, which has been held to repeal section 242 of chapter 23, allowing persons interested in the estate to appeal only after the expiration of the time allowed the executor or administrator to do so. See *Drexel v. Reed*, 65 Neb. 231. While, in the view we take of the case before us, it is not necessary to decide this point, we think it has been decided in principle in *Cadman v. Richards*, 13 Neb. 383.

It has been urged that the district court should have set a time for hearing therein upon the claim in question, and proceeded to a trial thereon, instead of formally reversing the judgment of the county court and remanding the cause for such action in that court. No petition in error was filed by the defendant in error in this court, and this contention was made only by counsel in oral argument. The closing sentence of the brief of the defendant in error is, "In any event, therefore, the judgment of the district court should be affirmed."

In the opinion announced by this court, written by POUND, C., disposing of the motion to dismiss this action, reported in 69 Neb. 38, it is said:

"It will be seen therefore that the district court clearly had the power to render a final judgment upon the merits of the claim. The order denying leave to file the claim was a final order since it in effect prevented a judgment and determined the proceeding, within the purview of section 581 of the code. When this order was appealed from and the transcript filed, the district court acquired jurisdiction of the whole matter and power to deal with it as though the application had been filed in that court originally. *Jacobs v. Morrow*, 21 Neb. 233. Even if the cause had been taken to the district court upon error, the same

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course would have been proper. *Maryott & McHurron v. Gardner*, 50 Neb. 320. The legislature evidently intended that causes should be settled finally in the district court when taken there by appeal or error and that parties should not be compelled to go back and forth from the lower to the higher tribunal in matters involving small sums as is so often the case in more important causes brought in the district court and reviewed in the supreme court. Hence, it is doubtful whether any warrant is to be found for the course taken in the case at bar so far as the judgment remands the cause for further proceedings in the county court." This statement of the law affecting this question, made in this case, having received the approval of the court, should be held conclusive thereon.

While, as we have said, no petition in error was filed by the defendant in error, yet, that of the plaintiff in error is sufficient to bring the judgment before us in such a manner as to require us to reverse any portion thereof which we hold to have been erroneously made.

We recommend that the judgment and order of the district court be affirmed, in so far as it reverses the order denying defendant in error to file her claim made by the county court, and reversed as to that part remanding the cause to the county court for hearing upon the claim, and that the cause be remanded from this court to the district court with directions to proceed to a final hearing thereon in that court.

BARNES and ALBERT, C.C., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court, reversing the order of the county court and granting leave to file the claim involved, is affirmed, and the order directing the county court to allow the filing of the claim is reversed, and the cause is remanded to the district court with directions to proceed to a final hearing thereon in that court.

JUDGMENT ACCORDINGLY.



## OMAHA GAS COMPANY ET AL. V. CITY OF SOUTH OMAHA.

FILED FEBRUARY 4, 1904. No. 13,209.

1. **Petition: DEMURRER.** Petition examined, and *held* not subject to demurrer upon the ground of improper joinder of causes of action.
2. **Indemnifying Bond: ACTION: EVIDENCE.** In an action by a city against a gas company upon a bond given by the latter to indemnify the city against loss through the recovery against the city for injuries occasioned by open trenches dug by the company, the execution and delivery of the bond was admitted, and the evidence established the recovery of a judgment against the city for a personal injury resulting from an open trench dug by the company. *Held*, That there was a liability against the company on the bond, and that the city was entitled to judgment. *Held, further*, That evidence of the presence or absence of negligence of either the company or the city as related to the injury was immaterial.
3. **Instruction.** Instruction examined, and *held* properly refused.

ERROR to the district court for Douglas county: GUY R. C. READ, JUDGE. *Affirmed*.

*George E. Pritchett*, for plaintiffs in error.

*A. H. Murdock*, *contra*.

KIRKPATRICK, C.

This is an error proceeding prosecuted from a judgment of the district court for Douglas county to reverse a judgment recovered by the city of South Omaha, hereinafter styled the city, against plaintiffs in error, the Omaha Gas Company, hereinafter styled the company, and Frank Murphy, its surety. Three grounds of error are relied upon for a reversal of the judgment: First, that the court erred in overruling the demurrer of the company upon the ground that there were two causes of action improperly joined in the petition; second, that there was not sufficient evidence to entitle the city to judgment, and that, on the evidence received, the company was entitled to

judgment; third, that the court erred in refusing to give instruction numbered 2, requested by the company. The questions raised by these various assignments of error will be considered in their order, so far as necessary to a right determination of the case.

That a correct understanding of the first contention may be had, it will be necessary to state very briefly the transactions out of which the controversy arose. Some time prior to November 25, 1897, the city, by ordinance, granted to the company, upon certain conditions, a franchise to excavate trenches in the streets and alleys, and to lay pipes and cross-mains, for the purpose of supplying the citizens of the city with gas. As a condition precedent to the exercise of the rights under the franchise, it was by ordinance provided, that the company should execute to the city a good and sufficient bond in the sum of \$5,000, that it would indemnify and hold harmless the city from all loss and damages resulting from suits brought against the city, on account of accidents occasioned by the excavations.

Some time in November, 1897, one Burk accidentally drove into one of the trenches dug by the company, and sustained injuries. In a suit against the city he recovered damages, the judgment being affirmed by this court, and the city satisfied the judgment by payment. The action at bar was brought by the city against the company for the amount of this judgment with costs. In its petition, the city set out a copy of the bond given by the company, and all other matters hereinbefore stated; and the company contends that no cause of action is stated upon the bond, and, also, no facts sufficient to entitle the city to recover over from the company for the Burk judgment. From a careful reading of the petition, we conclude that this contention of the company can not be sustained. The petition sets out a copy of the bond; the sureties thereon are made parties defendant, and are charged with liability in all respects as the company, and it seems quite clear that the petition contains but a single cause of action, and that,

one arising upon the bond. It therefore follows that the demurrer was properly overruled.

The next contention, relating to the sufficiency of the evidence, is to the effect that the company is shown to be free from fault, and that the injury to Burk was caused by the negligence of the city. The bond, which was given by the city to secure its franchise, contains a condition in the language following:

"The condition of this obligation is such, that, if the above bounden Omaha Gas Company, its successors and assigns, or any of them, shall well and truly indemnify, and save harmless, the City of South Omaha from, and against any loss resulting to said city, from damage suits brought against said city, from accidents resulting from the excavation of streets and alleys of said city, by said Omaha Gas Company, then, these presents to be void," etc. In its answer the company admitted the execution of the bond, and the excavation of the trenches by reason of which Burk was injured, and the testimony establishes the recovery of the judgment by him, its payment by the city, and the further fact that the gas company and Murphy, its surety, defendants, had due and timely notice of the pendency of Burk's suit, and were, by the city, invited to appear and take part in the defense; and it is further disclosed that the attorney for the company did, in fact, appear and assist in the defense. This being the condition of the record, it would seem absolutely to fix the liability of the company. Numerous authorities are cited by counsel upon both sides of this case, upon the question of the liability over in this kind of a case, but in the view we take of the matter, it will not be necessary to consider them. The right to recover upon the bond in suit does not depend upon the presence or absence of negligence on the part of either the city or the company, but rather, under the terms of the bond, upon whether the city has suffered a recovery, because of the excavations made by the company.

Instruction numbered 2, requested by the company,

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presents the question of negligence of the company for the consideration of the jury. In view of what has just been said, the refusal of this instruction, it is apparent, was not error. Having reached this conclusion, it will not be necessary to consider the other errors urged. The judgment appears to be right, and it is therefore recommended that the same be affirmed.

DUFFIE and LETTON, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is

AFFIRMED.

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ARRAM L. COVEY v. ANDREW J. HENRY.

FILED FEBRUARY 4, 1904. No. 13,360.

1. Real Estate: SALE: CONTRACT. A verbal contract with an agent or broker to sell land for the owner or to obtain a purchaser therefor is void.
2. Petition. SUFFICIENCY. A failure to state a cause of action in the petition can not be cured by averments in the reply.
3. ———: DEMURRER. Petition examined, and held not to state a cause of action.

ERROR to the district court for Howard county: JAMES N. PAUL, JUDGE. *Affirmed.*

A. A. Kendall, for plaintiff in error.

T. T. Bell, contra.

FAWCETT, C.

This case was originally commenced in the county court of Howard county, to recover the sum of \$200, which plaintiff claimed to be due him from the defendant as a commission for finding a purchaser for defendant's land.

On the same day that plaintiff filed his petition in the county court, defendant filed an answer substantially admitting the allegations of plaintiff's petition, but claiming that one Harry L. Cook also claimed to have produced the purchaser for said land and demanded the commission, and alleging that he was unable to determine which of said parties was entitled to the commission, and deposited \$200 in court, asking the court to determine the right of the parties to said money. On the next day the parties both appeared in county court, by their attorneys, and defendant asked leave to withdraw his answer and deposit, which leave was granted, and the answer and deposit were withdrawn. Subsequently, plaintiff filed an amended bill of particulars, to which an answer was filed, and, without any reply to said answer, the parties went to trial in the county court before a jury, which resulted in a verdict and judgment for the plaintiff for the sum of \$150, from which the defendant appealed to the district court. In the district court the plaintiff filed his petition, which was an exact duplicate of the amended bill of particulars filed in the court below, and is as follows:

"Comes now the above named plaintiff and, for cause of action against the defendant, alleges, that on or about the — day of June, 1901, or some time previous thereto, the defendant was the owner of the south half of section eight, in township fifteen north of range ten west of the 6th principal meridian, in Howard county, Nebraska.

"That on or about that time the defendant, being desirous of selling said land, entered into an oral agreement with the plaintiff, and agreed that if the plaintiff would find a purchaser for said land, who would buy the same from the defendant, he, the defendant, would pay the plaintiff, for so doing, the sum of \$200, and defendant stated his price for said land to be the sum of \$8,000. .

"That thereafter, to wit: on or about the 28th day of August, 1901, the plaintiff did find a purchaser for said land, viz.: one Charles Sumovich, and plaintiff took said Sumovich to said land and showed him the said land, and

the said Sumovich made a close and careful examination of said land; and was satisfied with the said land, and told plaintiff that he would go home and make arrangements for the money to pay for said land with, and would return to the defendant herein and would buy said land from the defendant.

"That the plaintiff then told the defendant that he had found a purchaser for said land, and told him what said Sumovich had said, and told him that said Sumovich would return, as he had said he would, and that he would buy said land from the defendant, and the defendant was then satisfied with said arrangement.

"That thereafter, on or about the 24th day of September, said Sumovich did return to St. Paul, and did go to said defendant as he had said he would, and he did buy said land from the defendant as he had said he would, and defendant sold said land to said Sumovich for the sum of \$8,500.

"That, on the 25th day of September, the plaintiff, not knowing that said sale had been made, again called upon the defendant and told him that said Sumovich was in town, and that he had come to buy said land, and said defendant again promised, orally, that if said Sumovich did buy said land, he, the defendant, would pay the plaintiff the said sum of \$200. That the defendant knew at that time that he had sold said land to said Sumovich, but concealed the fact from the plaintiff.

"Wherefore, the plaintiff says there is now due him from the defendant the sum of \$200, agreed as aforesaid to be paid by the defendant, which the defendant refuses to pay, though often requested so to do, and for which sum the plaintiff prays judgment, and for the costs of this suit."

An answer was filed to this petition, a reply to the answer, and a trial had in the district court, which resulted in a verdict for the plaintiff for \$100, which verdict, on motion of defendant, was set aside and a new trial ordered. Plaintiff then, by leave of court, filed an amended

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reply. The first paragraph of the reply is a general denial. The second paragraph alleges that the law, requiring contracts between the owners of land and agents authorized to sell the same to be in writing, does not apply to such contracts as the one between plaintiff and defendant. The third paragraph alleges that said law is against public policy and, therefore, unconstitutional and void. The fourth paragraph alleges that the defendant waived the defense of the statute of frauds, by the filing of the answer and making the deposit in the county court, hereinbefore referred to. The fifth paragraph alleges that the making of said answer and the deposit of said money in the county court constituted a new contract, which related back to the original contract, and that said original contract was, therefore, taken out of the statute of frauds, and defendant ought not now to be allowed to plead said statute. The sixth paragraph is, in substance, the same as the fifth. The seventh paragraph alleges that defendant, having accepted the services of plaintiff, and having accepted that part of said contract which was beneficial to himself, should not now be allowed to repudiate that part of the contract which is detrimental to himself.

Defendant then filed a motion to strike from the amended reply all of paragraphs four to seven, both inclusive, for various reasons set out in the motion. This motion was overruled. Upon defendant filed the following demurrer:

"Comes the defendant and demurs generally to the amended reply of the plaintiff filed herein, for the reason that neither the amended reply nor the petition, nor both, state a cause of action in favor of the plaintiff and against the defendant."

The demurrer was sustained, and plaintiff electing to sustain the petition and amended reply, the cause was dismissed at the cost of plaintiff.

The first six assignments of error, but they are all practically included in the first and second assignments: that the court erred in sustaining the demurrer to the

reply and petition, and erred in dismissing plaintiff's cause of action.

While the defendant, in his demurrer, says that he "demurs generally to the amended reply of the plaintiff filed herein," yet the trial court and the parties to the action seem to have treated it as a demurrer to both the reply and petition, and we shall treat it in the same manner.

Defendant, in support of his demurrer, relies upon section 74, chapter 73, Compiled Statutes (Annotated Statutes, 10258), which reads:

"Every contract for the sale of lands, between the owner thereof and any broker or agent employed to sell the same, shall be void, unless the contract is in writing and subscribed by the owner of the land and the broker or agent, and such contract shall describe the land to be sold, and set forth the compensation to be allowed by the owner in case of sale by the broker or agent."

He contends that plaintiff's petition, upon its face, shows that his agreement with defendant was an oral agreement for the sale of lands, and does not allege any facts which would in any manner take the contract out of the statutory prohibition; that the petition does not state a cause of action, and that this defect in the petition could not be cured by any averments in the reply. The rule of practice contended for by defendant, that a cause of action can not be pleaded in the reply, is so well settled, that a citation of authorities is unnecessary, and if plaintiff must rely upon the allegations of waiver in his reply, he must fail in this action.

Plaintiff contends that the allegations contained in the last paragraph of his petition, taken in connection with his allegations as to the original oral agreement, take the case out of the statute, and entitle him to recover on the theory that "a past consideration is sufficient to support a promise, where the consideration was performed in pursuance to a previous request"; and relies chiefly on *Stuht v. Sweeney*, 48 Neb. 767, to sustain his contention. The rule of law here invoked is not only sound, but a well



established rule, and if it can be applied to this case it would entitle plaintiff to a reversal, and to an opportunity to have his case tried upon the merits in the district court. We have carefully examined *Stuht v. Sweesy*, but the facts in that case are so radically different from the facts in the case at bar that it can not be accepted as authority here. In *Stuht v. Sweesy*, Stuht had agreed in advance that a party wall should be built upon the lot line; he went with Sweesy to the architect and suggested various changes in the plans and specifications, so that the wall, when completed, would inure directly to his benefit, in the use of a building which he purposed subsequently to construct in connection with the said party wall. Sweesy made the changes in the plans and specifications suggested by Stuht, and went on and constructed the wall, Stuht inspecting it from time to time as the work proceeded, and being satisfied therewith. After the wall was constructed, Stuht promised to pay Sweesy for one-half the cost of construction of the wall up to and including the third story, according to the terms of an agreement which had formerly been made with one Chapman, which promise he subsequently failed to make good, and suit was brought to recover the amount. On the trial, Stuht sought to escape under the contention that the promise was within the statute of frauds and void because not in writing. In the opinion Mr. Commissioner IRVINE says:

"Whether a promise in such a case is within the statute of frauds we need not inquire. If it were it would be, in this case, taken out by part performance."

Sweesy was permitted to recover. We are unable to see how we can apply the rule, which was properly applied in that case, to the case at bar.

The section of the statute above set out is plain and unambiguous. The reasons which impelled the legislature to pass that act are well known to the courts and the profession generally. Innumerable suits were being instituted, from time to time, by agents and brokers, after

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the owners of lands had sold the same, claiming a commission, on the ground that they had been instrumental in securing the purchaser; and, in many cases, owners of land were compelled to pay double commission on account of such claims. In order to prevent such disputes and protect property owners in just such cases as the one we are now considering, the legislature passed this act.

In considering a code provision similar to this section of our statute, the supreme court of California in *McCarthy v. Loupe*, 62 Cal. 299, say:

"Since the code, under the provisions of section 1624, an agreement authorizing or employing an agent or broker to purchase or sell real estate for a compensation or commission, can only be proved by the introduction of an instrument in writing."

In *Allen v. Hall*, 64 Neb. 256, in a very clear opinion by Commissioner BARNES, this court upheld this section of the statute, and applied it to a case where the facts were fully as strong, if not stronger, than those set out in plaintiff's petition in this case. See, also *Baker v. Gillan*, 68 Neb. 368; *Spence v. Apley*, 4 Neb. (Unof.) 358.

Plaintiff in error contends that there is a distinction between an agent to sell land and an agent to find a buyer; that in the one case the agent has power to make the sale and bind his principal, while in the other he has not. As between the seller and the agent this is a distinction without a difference, for in either case, if there were a valid employment, the seller would be liable to the agent for his commission if he made a sale, or found a buyer. The only difference to be found in this distinction is that, in the former case, the buyer could demand performance by the seller, while in the latter case he could not. But, it is apparent that this statute was not enacted to aid buyers in the enforcement of their contracts of purchase. It was designed, simply, to put an end to the ceaseless disputes and innumerable suits that were constantly arising between the owners of lands and curbstone brokers. The cases of *McCarthy v. Loupe* and *Allen v. Hall*, *supra*, were

both cases in which the plaintiffs claimed to have been employed to secure purchasers, and are therefore decisive of this question. The contention of plaintiff in error that the defendant, having received the benefit of plaintiff's services, can not be relieved of his liability to pay for the same, is also disposed of adversely to plaintiff's contention in *McCarthy v. Loupe, supra*.

We think the statute a wise one, and that it applies to the case at bar: that the allegations contained in the last paragraph of plaintiff's petition are not sufficient to relieve him from the provisions thereof; and, this being so, that the petition could not be aided by any averments in the reply; that, not having pleaded the estoppel (if any there were), by reason of the answer and deposit of defendant in the county court, in his amended bill of particulars in that court, he could not plead it in the district court and can not raise the question here.

The judgment of the trial court was therefore right and should be affirmed, and we so recommend.

ALBERT and GLANVILLE, C.C., concur.

By the Court: For the reasons stated in the foregoing opinion, the decree appealed from is

AFFIRMED.

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JOHN L. HODGES V. NATHAN GRAHAM ET AL.

FILED FEBRUARY 4, 1904. No. 13,363.

1. **Referee's Report: STIPULATION: ESTOPPEL.** Where parties consent that the report of a referee, containing the evidence taken by said referee and his findings of fact and conclusions of law, shall be submitted to the court, together with the objections and exceptions thereto, for determination on the merits by the court, they are precluded by such submission from assigning error by the court in setting aside the report and findings of the referee and substituting therefor the findings of the court.

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2. **Review.** In such case this court will only consider the correctness of the findings and judgment of the district court.
3. **Evidence.** Evidence examined, and *held* to sustain the findings and judgment of the district court.

ERROR to the district court for Clay county: GEORGE W. STUBBS, JUDGE. *Affirmed.*

*Thomas H. Matters*, for plaintiff in error.

*Leslie G. Hurd*, *contra*.

FAWCETT, C.

This is an action brought by plaintiff in error, herein-after styled plaintiff, against the defendants in error, hereinafter styled defendants, alleging that about the first of January, 1894, the plaintiff and defendants entered into an agreement and contract of copartnership at Clay Center, Nebraska; the business of said copartnership to be to purchase, own and control a printing outfit then known as "The Progress," a newspaper outfit at Clay Center, Nebraska, and to publish said newspaper. That each member of said copartnership was to put into the business the sum of \$127.20, which money was to be used in the purchase of the printing outfit, above described, the payment of the indebtedness due upon the same, and also to pay one claim due to the plaintiff from the former owners of said printing outfit, in the sum of \$312.50. That they proceeded to and did purchase said printing outfit, and did run said newspaper. That the defendants have failed, neglected and refused to pay in the amount of money agreed to at the time, and have never paid into said partnership any other sum except the amount of \$87.50 each; that they have neglected, failed and refused to pay any portion of the amount due to the plaintiff, and that, by reason of said failure, there is due and owing from the defendants to the plaintiff the said sum of \$312.50, for which amount he prays judgment.

The matters in controversy in this case were, on May

23, 1900, by consent of both parties in open court, referred by the court to H. C. Palmer, to take the testimony and report his findings of fact and conclusions of law to the court. On November 9, 1900, the referee filed his report, containing all the evidence introduced before him, together with his findings of fact and conclusions of law. The findings of fact and conclusions of law were all in favor of plaintiff, and that plaintiff was entitled to recover a judgment against the defendants, and each of them, for the sum of \$332.45 and interest from September 20, 1900, at the rate of seven per cent. per annum. To the report of the referee the defendants filed a large number of objections, and a motion for new trial. On November 11, 1901, the court set aside all of the findings of fact and conclusions of law of the referee, and awarded a new trial. On November 15, 1901, the court made an allowance to the referee of \$50 for his services. On December 16, 1902, plaintiff filed a reply, and on the same day a subpoena *duces tecum* was issued to H. C. Palmer, referee, commanding him to appear before the court, and bring with him certain records which had been offered and read in evidence before him, as referee. On December 17, 1902, we find the following entry by the court:

"This cause coming on further to be heard, now come the parties to this action, in open court, and consent to the order or ruling of the court as follows: 'Order setting aside report of referee made November 11, 1901, is set aside.' Case set down for hearing upon report of referee and objections thereto, and motion for new trial. Court to act upon objections at present term of court and to enter final decision for merits, whatever the decision upon objections and upon the testimony taken before the referee. Rights of both parties to a bill of exceptions to be fully protected, and all the above by consent of parties, in open court, and this cause submitted to the court on report of referee, under above stipulation."

On March 13, 1903, the court entered its findings and decree, in which it set aside the findings and conclusions of

the referee, and entered findings of its own, finding generally for the defendants; overruled defendants' motion for new trial, and dismissed plaintiff's bill for want of equity.

The reason assigned by the court for setting aside the findings of the referee is that said findings were contrary to the clear weight of the evidence. Plaintiff contends that this is not so; that there is ample evidence in the record to sustain the findings of the referee, and that the court erred in setting the same aside. It is urged by defendants that plaintiff can not make such contention in this court, for the reason that, by the agreement, in open court, entered into December 17, 1902, hereinbefore set out, plaintiff consented to the submission of the case to the court upon the evidence taken by the referee, and that the court might make its own findings upon the merits, regardless of its rulings on the objections to the report of the referee. If the contention of the defendants is sound, then, the only question for this court to determine is, whether the evidence sustains the finding and judgment of the court. An examination of the record leads us to the conclusion that this contention of defendants is correct. After the order of the court entered November 11, 1901, setting aside the findings of the referee and granting a new trial, the parties seem to have been preparing for another trial of the case, which is shown by the settlement with the referee on November 15, and the filing of a reply and issuance of a subpoena on December 16, 1902. On December 17, when the parties were all in court, and, evidently, after discussing the matter, and all agreeing that the evidence taken before the referee was all the evidence that could be introduced in the case, and, in order to avoid the trouble, time and expense of another trial, it was agreed between them that the matter be submitted to the court upon the evidence contained in the report of the referee, and that the court should make such findings on the merits as it deemed proper. The court's entry made at that time is not as explicit as it might have been. The language is, "Case set

down for hearing upon report of referee and objections thereto, and motion for new trial. Court to act upon objections at present term of court and to enter final decision for merits, *whatever* the decision upon objections and upon the testimony taken before the referee." It is evident that what the court meant to say was: Court to act upon objections at present term of court and to enter final decision upon the merits, *regardless* of its decision upon the objections to the report of the referee. The entry further provides for the preservation of the rights of the parties to a bill of exceptions, and recites that the case is submitted to the court under that stipulation. We are confirmed in our construction of that entry by the court, by the court's own construction of it on page 145 of the record. The court says:

"And now, on this same day, this cause coming on further to be heard (the parties having agreed in open court that, in case the findings of the referee should be set aside, the court should make the proper findings upon the evidence as reported by the referee and pronounce judgment thereon), upon the evidence and arguments of counsel, and the court, being fully advised in the premises, doth find generally in favor of the defendants," etc.

We think this language of the court conclusively shows the true action and intention of the parties on that occasion. This being so, then, the only question for our consideration is, whether or not the court erred in its findings and judgment. While we are unable entirely to concur in the view of the district court in holding that the findings of the referee were against the *clear weight* of the evidence, we are unable to say that the court's own findings are not sustained by the evidence. The evidence, in our judgment, was conflicting, and, having been submitted to the district court by the parties, and the court having made its findings thereon, those findings must stand.

We recommend that the judgment be affirmed.

ALBERT and GLANVILLE, CC., concur.

the referee, and entered findings of its own, finding generally for the defendants; overruled defendants' motion for new trial, and dismissed plaintiff's bill for want of equity.

The reason assigned by the court for setting aside the findings of the referee is that said findings were contrary to the clear weight of the evidence. Plaintiff contends that this is not so; that there is ample evidence in the record to sustain the findings of the referee, and that the court erred in setting the same aside. It is urged by defendants that plaintiff can not make such contention in this court, for the reason that, by the agreement, in open court, entered into December 17, 1902, hereinbefore set out, plaintiff consented to the submission of the case to the court upon the evidence taken by the referee, and that the court might make its own findings upon the merits, regardless of its rulings on the objections to the report of the referee. If the contention of the defendants is sound, then, the only question for this court to determine is, whether the evidence sustains the finding and judgment of the court. An examination of the record leads us to the conclusion that this contention of defendants is correct. After the order of the court entered November 11, 1901, setting aside the findings of the referee and granting a new trial, the parties seem to have been preparing for another trial of the case, which is shown by the settlement with the referee on November 15, and the filing of a reply and issuance of a subpoena on December 16, 1902. On December 17, when the parties were all in court, and, evidently, after discussing the matter, and all agreeing that the evidence taken before the referee was all the evidence that could be introduced in the case, and, in order to avoid the trouble, time and expense of another trial, it was agreed between them that the matter be submitted to the court upon the evidence contained in the report of the referee, and that the court should make such findings on the merits as it deemed proper. The court's entry made at that time is not as explicit as it might have been. The language is, "Case set



down for hearing upon report of referee and objections thereto, and motion for new trial. Court to act upon objections at present term of court and to enter final decision for merits, *whatever* the decision upon objections and upon the testimony taken before the referee." It is evident that what the court meant to say was: Court to act upon objections at present term of court and to enter final decision upon the merits, *regardless* of its decision upon the objections to the report of the referee. The entry further provides for the preservation of the rights of the parties to a bill of exceptions, and recites that the case is submitted to the court under that stipulation. We are confirmed in our construction of that entry by the court, by the court's own construction of it on page 145 of the record. The court says:

"And now, on this same day, this cause coming on further to be heard (the parties having agreed in open court that, in case the findings of the referee should be set aside, the court should make the proper findings upon the evidence as reported by the referee and pronounce judgment thereon), upon the evidence and arguments of counsel, and the court, being fully advised in the premises, doth find generally in favor of the defendants," etc.

We think this language of the court conclusively shows the true action and intention of the parties on that occasion. This being so, then, the only question for our consideration is, whether or not the court erred in its findings and judgment. While we are unable entirely to concur in the view of the district court in holding that the findings of the referee were against the *clear weight* of the evidence, we are unable to say that the court's own findings are not sustained by the evidence. The evidence, in our judgment, was conflicting, and, having been submitted to the district court by the parties, and the court having made its findings thereon, those findings must stand.

We recommend that the judgment be affirmed.

ALBERT and GLANVILLE, CC., concur.

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By the Court: For the reasons stated in the foregoing opinion, the decree appealed from is

**AFFIRMED.**

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**HELEN L. JONES V. ALICE S. DANFORTH.**

FILED FEBRUARY 17, 1904. No. 13,362.

1. **Appeal and Error.** A litigant, who brings to this court an appealable case, can not have it considered in this court both as an appeal and as a proceeding in error.
2. ———: **ELECTION.** If, in an appealable case, a transcript of the proceedings in the district court is duly filed in this court, and all proceedings taken necessary to a review upon proceedings in error as well as upon appeal, the party bringing the cause here may submit the same either as an appeal, or as upon proceedings in error. If he makes no choice, it will be considered as upon proceedings in error.
3. ———: ———. After serving and filing his brief in this court, in which he presents only questions not reviewable upon appeal, a party will not, ordinarily, be allowed to delay the hearing, by abandoning his proceedings in error and submitting the cause as upon appeal. Nor will he be allowed to make such change, except upon just terms, when his opponent will be required to rebrief the case, or is otherwise put to cost or expense thereby.

**ERROR** to the district court for Clay county: **GEORGE W. STUBBS, JUDGE.** *Objections to application to have case considered as upon appeal. Objections overruled.*

*Thomas H. Matters, for plaintiff in error.*

*Joel W. West, contra.*

**SEDGWICK, J.**

After a decree was entered for the defendants in the district court in an action in equity, the plaintiff filed in this court, within the time allowed by law for taking an appeal or prosecuting proceedings in error, a transcript of the proceedings in the court below, and a petition in error.

A summons in error was issued and served upon some of the defendants in error, but, not having been served upon all of the necessary parties, objections were made to the jurisdiction of the court, and the petition and summons in error were dismissed. The plaintiff below then asked to have his case in this court treated as an appeal, and the question upon this motion is, whether the case may be now heard as an appeal in this court. Many decisions of the court have been cited by counsel. It seems to be thought that they are conflicting and irreconcilable. Judge Strawn, in his work on Supreme Court Practice and Forms, 217, 218, so regards them. In the earlier practice it was several times attempted to have a case considered in this court both in the nature of an appeal and as a proceeding in error, but this the court refused to do. In *Monroe v. Reid, Murdock & Co.*, 46 Neb. 316, it is said:

"A case will not be considered in this court as both an appeal and a proceeding in error. A party must elect which remedy he will pursue, and, having filed a petition in error, must be presumed to have selected that remedy."

This case and many others which follow it are said by Mr. Strawn to be in direct conflict with the holding in *Beatrice Paper Co. v. Beloit Iron Works*, 46 Neb. 900, in which it is said:

"If the judgment which the litigant seeks to have reviewed is appealable, he may have it reviewed on appeal or error, at his election; and he may make such election at any time before the final submission of the case in this court. He may dismiss his appeal and stand on his petition in error, or *vice versa*; but if he makes no such election, this court will review the judgment of the district court on error when there is filed with the transcript a petition in error."

This language is quoted, or cited, with approval in several subsequent cases. *Thomas v. Churchill*, 48 Neb. 266; *Chicago, B. & Q. R. Co. v. Cass County*, 51 Neb. 369; *Nebraska Land, Stock Growing & Investment Co. v. McKinley-Lanning Loan & Trust Co.*, 52 Neb. 410; *Slobodisky*

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*v. Curtis*, 58 Neb. 211. The conflict in these two lines of cases is more apparent than real. In *Monroe v. Reid, Murdock & Co., supra*, it appears from the opinion that "the case was one which could have been appealed, and counsel for plaintiff in error, judging from a statement in the brief filed, view the case as here by appeal and by proceedings in error, and that it can be so considered." The court then quotes with approval from the opinion of *Woodard v. Baird*, 43 Neb. 310, to the effect that a party can not have his case submitted and considered both as an appeal and as a proceeding in error, and says that he must elect which remedy he will pursue, and, having filed a petition in error, he must be presumed to have selected that remedy. It is not necessary to quote from nor cite any other cases where this language is held, because, in all of them, we find one of two conditions: Either the party is urging that his case shall be considered in both ways, and that he shall, at the same time, have the benefit of both forms of procedure, or else, without specifically insisting upon the right to both remedies, no election has been made before the submission of the case. In all of these decisions it is held that a party can not pursue both remedies at once, and that, if the record is in such condition as that either remedy might have been pursued thereon, and the party bringing the case to this court has not expressly indicated which remedy he desires to pursue, the court, in making an election for him, will treat the case as here upon proceedings in error. And in all these cases where the language is used, "having filed a petition in error," as the test of the remedy elected by the party bringing the case here, the facts were that not only had a petition in error been filed but all the necessary steps had been taken to entitle the defendant to a hearing upon his petition in error, and, the case being finally submitted to this court upon such a record, the court considered it as a proceeding in error. So that the language used by the court must, in each case, be construed in the light of the facts of the case; and,

when so construed, there is no conflict between this holding and the language used in the decisions following *Beatrice Paper Co. v. Beloit Iron Works*, *supra*, in which it is held that he may make his election at any time before he submits his case to this court. He may make his election before he finally submits his case; but, if he fails to elect which remedy he will pursue, and the court takes a submission of the case in that condition, in the absence of any other decisive test, the court will consider that, by filing a petition in error and taking all necessary steps for a hearing thereon, he has selected that remedy. This would be the necessary inference if, after having taken all the proceedings necessary to a hearing upon appeal, steps not necessary to an appeal but necessary to obtain a review in error are taken. Such action, unexplained, must mean that he is not satisfied to submit his case upon appeal, and desires to have it considered upon error proceedings.

Of course, if the time for filing a petition in error and procuring a summons in error to be issued and served had expired, he could not take such proceedings, and whether or not he had attempted to appeal would make no difference in that regard. An ineffectual attempt to appeal would not extend the time in which he might take proceedings in error. While the record is in such condition that it will support either proceeding, he may choose his remedy.

Filing a petition in error is not, in all cases, a conclusive test, but a litigant will not be allowed to trifle with his adversary and the court. If he serves and files a brief, which presents questions only reviewable upon proceeding in error, and his opponent has duly answered such brief, he ought not, afterwards, submit the case as upon appeal, and serve and file a brief which presents questions solely cognizable upon such proceeding, if, by so doing, the hearing of the case will be delayed. And even if such course will not delay the hearing of the case, it should not be allowed, except upon just terms.

In *Stewart v. Carter*, 4 Neb. 564, the case was first brought to this court upon appeal, but, upon motion of the appellee, the appeal was dismissed, and, although the time for appeal had expired, the appellant was allowed to file a petition in error upon his transcript, and the case was afterwards reversed on the error therein assigned. The same point was held in *Steele v. Haynes*, 20 Neb. 316. The case of *Irwin v. Nuckolls*, 3 Neb. 441, which appears to hold a contrary doctrine, was expressly overruled in *Cahill v. Cantwell*, 31 Neb. 158. In *Schuyler v. Hanna*, 28 Neb. 601, it is said:

"A liberal construction should be given all laws providing for appeals—such a construction as will not abridge the right. The mandatory part of the above quoted statute is 'that the party appealing shall within six months after the date of the rendition of the judgment or decree, or the making of the final order, \* \* \* file in the office of the clerk of the supreme court a certified transcript of the proceedings had in the cause in the district court.' On the filing of such transcript within the statutory time, this court acquires jurisdiction."

We are satisfied with this view, and think that the question at bar comes within its spirit. *Cahill v. Cantwell*, *supra*, was an attempted appeal from the county court to the district court, but it was not taken in time, and was dismissed upon motion of appellee. The question was whether the appellant was estopped from prosecuting a petition in error to reverse the same judgment. The court said:

"It may be stated as a general proposition that an appeal duly taken and docketed in time in the appellate court is a waiver of all errors and irregularities occurring prior to the entry of the judgment appealed from. In the case at bar the appeal was not perfected in time, and the attempt to appeal did not bar the right of the plaintiff in error to have the judgment of the county court reviewed on error."

In this case the error proceedings were never perfected. A hearing upon proceedings in error has been prevented

by technical objections. All steps necessary to perfect an appeal were taken within the statutory time, and it is not the policy of the law to prevent a hearing in the court of last resort under such circumstances.

It is urged that the statute prescribes that, in taking an appeal, the appellant must file his transcript in this court and have the same "properly docketed"; that this statute has not been complied with, because it was not docketed here as an appealed case. We do not see any merit in this contention. The appellant can not have the same properly docketed, in the sense that he may compel the clerk to make the entries in proper form. The intention of the statute must certainly be to require the appellant to do everything incumbent upon him to do, so that the case may be properly docketed, and when he has done that, he has done his part. Again, the words "properly docketed" can not be held to relate to nice distinctions in making the entries upon the record in correct form, but rather to the duty of doing what is necessary to have the case placed upon the docket of the court, so that it will be before the court in its proper order, and that adverse parties may raise such questions thereon as they see fit. If the question presented in this court was of such a nature that it might be determined either upon appeal or error proceedings, then a change of election as to the manner of presenting it would be immaterial, as was held in *Thomas v. Churchill*, 48 Neb. 266.

The objection to proceeding as upon appeal in this case is overruled.

**OBJECTION OVERRULED.**

STATE, EX REL. FRANK N. PROUT, ATTORNEY GENERAL, V.  
THOMAS J. NOLAN ET AL.

FILED FEBRUARY 17, 1904. No. 13,327.

1. **Quo Warranto: ANSWER.** An answer to a petition in quo warranto, which alleges that the respondents are holding the office in question by lawful appointment, under the provisions of a legislative act, and which sets forth the facts in relation thereto, is sufficient to put the validity of such act in issue.
2. **Legislative Act: CONSTITUTIONALITY.** A legislative act should not be declared unconstitutional, unless it is so clearly in conflict with some provision of the fundamental law that it can not stand.
3. **Police Commissioners: APPOINTMENT.** The legislature may, by statute, confer upon the governor the power to appoint the board of fire and police commissioners for cities of the first class.
4. **Statutes: REPEAL.** Where general and special provisions of a statute come in conflict, the general law yields to the special without regard to priority in dates, and a special law will not be repealed by general provisions, unless by express words or by necessary implication.
5. ———: **CONSTRUCTION.** The several sections and provisions of a legislative act should be construed together, and harmonized if possible; and, if there is a conflict in them, general expressions must give way to special and specific provisions.
6. **City Charter: VALIDITY.** That part of the charter of South Omaha, providing for the election and defining the jurisdiction of the police judge, is separable from the rest of the act, and, if necessary, may be rejected without affecting the validity of the charter.
7. **Fire and Police Board: LEGALITY.** *Held*, That the respondents are the lawfully constituted board of fire and police commissioners of the city of South Omaha.

ORIGINAL application in the nature of quo warranto to determine the rights of respondents to office as fire and police commissioners of a city of the first class. *Writ denied.*

*Frank N. Prout, Attorney General, Norris Brown, Smyth & Smith and A. H. Murdock, for relator.*

*F. A. Brogan and James H. Van Dusen, contra.*



**BARNES, J.**

This original action in quo warranto was commenced by the attorney general for the purpose of testing the validity of chapter 17 of the laws of 1903, otherwise known as the South Omaha Charter, and more particularly that part of the act which provides for the appointment of a board of fire and police commissioners. To that end a petition was filed against the respondents, Thomas J. Nolan, A. L. Bergquist, William B. Van Sant, Alfred A. Nixon and George W. Masson, praying that they be required to show by what warrant or authority they assumed to act as fire and police commissioners of the city of South Omaha, and claimed to hold such public office. To this petition the respondents filed an answer, which was demurred to by the relator. Thereafter, by permission of the court, an amended answer was filed, in which respondents properly justified under the provisions of the act in question. The demurrer was not refiled but, it having been treated as though it applied to the amended answer, we will consider it as refiled, and thus the validity of that part of the act under which the respondents were appointed, and now hold their office, is put in issue. The act in question is chapter 17 of the laws of 1903 (Compiled Statutes, ch. 13, art. II), and will be hereinafter referred to as the charter.

It is stated in relator's brief that the answer is insufficient in form and substance, but, the amended answer having been filed after that part of the brief was written, and the defects of the original answer, if any, having been cured thereby, it is unnecessary to devote any further time to the pleadings, so we come at once to the consideration of the question of the validity of the charter. It may be stated at the outset that we should not declare a law void for slight and trivial reasons, but, if possible, sustain the legislative will. So, in the examination of this question, we will be governed by the rule, that a legislative act will not be declared unconstitutional, unless it is so clearly in

conflict with some provision of the fundamental law that it can not stand.

Section '63 of the act provides for a board of fire and police commissioners to consist of five electors of the city, appointed by the governor. It also makes specific provisions as to when and how the appointments shall be made, and term of office; it also defines the qualifications of members of the board, together with the powers and duties of that body; and the relator's attacks are particularly directed to this part of the charter. The general question relating to the constitutionality of such legislation has been before us several times. In the case of *State v. Broatch*, 68 Neb. 687, the validity of such a provision was the question before the court. The Omaha charter, which was in question in that case, provides for the appointment of a board of fire and police commissioners by the governor, and its validity was attacked by a proceeding in quo warranto. It was held:

"The legislature may by statute confer upon the governor the power to appoint members of the board of fire and police commissioners of cities of the metropolitan class"; citing *Redell v. Moores*, 63 Neb. 219. These cases clearly overrule all of the prior decisions of this court holding a contrary doctrine, and so, it may be considered as the settled law of this state that the section in question is constitutional, so far as that phase of the controversy is concerned. Again, it is apparent, from an examination of the whole act, that it was the purpose of the legislature to substantially reenact the charter of 1901 under which the city was conducting its affairs at the time the new charter was passed, with only such changes and amendments as would place the fire and police department of the city under the control of a board to be appointed by the governor of the state, instead of a board appointed by the mayor, and confirmed by the city council. It is clearly the duty of the state, in the exercise of its police powers, to maintain peace and good order, and protect the welfare of its citizens wherever they may be found within its borders.

And whenever it appears that any of its municipalities are, for any reason, unable to maintain such conditions of security and good order, it is proper for the legislature to enact such laws as will accomplish that end. Of late, it has been quite generally recognized that there are conditions existing in some of our cities, growing out of the appointment and management of their police departments, with which the local authorities are unable to successfully cope; and that an independent board, created by an authority entirely removed from, and in no way influenced by, local conditions, can best conserve the interests of the public in those matters. That policy first found expression in the Omaha charter of 1887, and was the subject of much litigation, and some conflicting decisions, until the principle was finally and firmly settled in the case of *State v. Broatch, supra*. And so, the legislature, in order to adopt this policy, reenacted the old charter with the changes above mentioned, and, in so doing, we are satisfied that it did not exceed its legitimate powers; if the legislature has attempted to go beyond its powers in authorizing this commission to control matters purely local, such provision might be held invalid, without rendering the whole act unconstitutional.

It is claimed, however, that section 63, in so far as it defines the powers and duties of the board, is in direct conflict with subdivision 78 of section 128 of the charter. This is one of the subdivisions of the section conferring general powers upon the municipality, and is as follows:

"In addition to the powers herein granted, cities governed under the provisions of this act shall have power by ordinance: To provide for the organization and support of a fire department; to procure fire engines, hooks, ladders, buckets, and other apparatus, and to organize fire engine, hook and ladder, and bucket companies, and prescribe rules of duty and the government thereof, with such penalties as the council may deem proper, not exceeding one hundred (\$100) dollars, and to make all necessary appropriation therefor, and to establish regulations for the

prevention and extinguishment of fires." And it is contended that this subdivision must prevail because it was passed last in point of time, or, in other words, appears last in position in the charter. This, it is insisted, works a repeal of section 63, by implication. Repeals by implication are not favored, and the courts will not declare them unless compelled to do so. And where there is a conflict between two sections of an act, one being a reenactment of a former provision, and the other a new provision inserted in the law as reenacted, the latter will stand because it is the latest expression of the legislative will. Sutherland, *Statutory Construction* (1st ed.), p. 210, sec. 156; p. 216, sec. 161; Endlich, *Interpretation of Statutes*, sec. 183; *Gratz v. McKenzic*, 3 Wash. 194; *Winn v. Jones*, 6 Leigh (Va.), 74; *Congdon v. Butte Consolidated R. Co.*, 17 Mont. 481; *Powell v. King*, 78 Minn. 83. But it is by no means certain that there is an irreconcilable conflict between the provisions of section 63 and the subdivisions and sections pointed out by the relator. Section 8 of the charter, which declares in a general way by whom the corporate powers shall be exercised, reads as follows:

"Each city governed by the provisions of this act shall be a body corporate and politic, and shall have power: First, to sue and be sued; second, to purchase and hold real and personal property for the use of the city, and real estate sold for taxes; third, to sell and convey any real and personal estate owned by the city, and make such order respecting the same as may be deemed conducive to the interests of the city; fourth, to make all contracts and do all other acts in relation to the property and concerns of the city necessary to the exercise of its corporate and administrative powers; fifth, to exercise such other and further power as may be conferred by law. The powers hereby granted shall be exercised by the mayor and city council of such city, as hereinafter set forth, except when otherwise specially provided." Bearing in mind the exception above quoted, the rule that the several sections of the charter must be construed together and harmonized, if

possible, and the further rule that, where there is a seeming conflict between the several provisions of a legislative act, general expressions must give way to special and specific provisions, it is quite possible that the board and council may properly conduct the government of the city without serious conflict of authority.

It is also contended that the provision giving power to the governor to remove members of the board for misconduct in office is in conflict with section 84, which apparently gives the same power to the district court. If this be true it is not sufficient ground for declaring the whole act void, for that provision can be expunged from the charter, and it will still be so complete as to furnish ample authority for the proper government of the city.

It is further contended that the charter must be declared unconstitutional and void, because of its provisions relating to the election of the police judge and his jurisdiction. This contention can not be maintained. This question was under consideration and was settled in *Moore v. State*, 63 Neb. 345, and *State v. Moore*, 70 Neb. 48, where it was held that the provisions of the constitution creating a police judge in municipalities were self-operating, and that, in the absence of valid enactments in the charter providing for their election, they could properly be elected at the regular biennial elections.

Lastly, it is claimed that there are many other conflicting provisions in the various sections and subdivisions of the charter. Under the rules above stated nearly, if not quite, all of these apparent conflicts can be reconciled, and the irreconcilable ones, if any, are not of sufficient importance to invalidate the act. But none of these matters require our consideration. The only question involved in this action, in its present form, is the validity and the constitutionality of that part of the charter under which the respondents hold their office, and, as we have seen, that part of the act is valid. This action only tests the right of respondents to hold the office in question, and can not be used for the purpose of restraining a public officer, or

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person exercising a public franchise, from doing any particular act or thing, the right of doing which is claimed by virtue of such office or franchise, and which constitutes a portion, only, or an integral part, of the rights, powers and privileges incident thereto. High, Extraordinary Legal Remedies (3d ed.), sec. 636; *State v. Evans*, 3 Ark. 585, 36 Am. Dec. 468; *People v. Whitcomb*, 55 Ill. 172.

The charter being valid, and the respondents having shown by their answer that they are holding the office in question by legal appointment thereunder, that they have qualified and are exercising the functions of their office, it follows that the relator is not entitled to the writ of ouster. The demurrer to the answer is overruled, the writ denied, and the action dismissed at the costs of the relator.

WRIT DENIED.

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**JAMES ROBINSON V. STATE OF NEBRASKA.**

FILED FEBRUARY 17, 1904. No. 13,528.

1. **MURDER: PROOF.** Where all of the elements necessary to constitute murder in the first degree are proved, a verdict of guilty will not be set aside because the state did not establish a motive for the commission of the crime.
2. **INSTRUCTIONS.** Instructions examined, and *held* properly given and refused.
3. ———. The repetition of an instruction is not reversible error, unless its effect is to mislead the jury.
4. **DISTRICT COURTS: JURISDICTION OF CRIMES.** Statutes examined, and *held*, that, by law, the territory defined by the legislative act of 1887 as Arthur county is attached to, and is within the jurisdiction of, McPherson county, and that the district court of that county has jurisdiction of crimes committed within such territory.

ERROR to the district court for McPherson county:  
HANSON M. GRIMES, JUDGE. *Affirmed.*

*Beeler & Muldoon* and *A. F. Parsons*, for plaintiff in error.

*Frank N. Prout*, Attorney General, *Norris Brown* and *Wilcox & Halligan*, contra.

BARNES, J.

On the 17th day of December, 1902, an information was filed in the district court for McPherson county against James Robinson, charging him with murder in the first degree. It was alleged, in substance, that on the 20th day of June, 1902, he unlawfully and feloniously, and of his deliberate and premeditated malice, in the county of McPherson, and the state of Nebraska, did shoot and kill one Elmer Thayer. On this charge Robinson was tried, and found guilty of murder in the first degree, the jury fixing the penalty at imprisonment in the penitentiary for life. He thereupon prosecuted error, and will hereafter be called the plaintiff.

His first contention is that the verdict is not sustained by the evidence, because the state failed to prove a motive for the killing. This contention can not be sustained. The law is well settled in this jurisdiction, as well as in others, that, where all of the essential elements of the crime are present, a conviction for murder will stand, even if there be no evidence of motive for its commission. Proof of motive is not necessary to procure a conviction. Maxwell, *Criminal Procedure* (2d ed.), 208; *Schaller v. State*, 14 Mo. 502; *Crawford v. State*, 12 Ga. 142; *Sumner v. State*, 5 Blackf. (Ind.) 579; *People v. Robinson*, 1 Park. (N. Y.) 649. Proof of motive, however, is always competent evidence against the accused, and absence of apparent motive may always be shown, and is simply a circumstance for the jury to consider. Where the evidence discloses, as in this case, that the accused shot and killed his victim without apparent cause, and thereafter offered no explanation for his act, a verdict of murder in the first degree should be permitted to stand.

Plaintiff's second contention is, that the court erred in giving instruction numbered 1, requested by counsel for the state. The particular part of the instruction complained of is:

"Still it does not require that the premeditation and

deliberation, or the wilful intent and purpose, shall exist for any length of time before the crime is committed."

We have carefully examined the instruction, and find that it is a copy of the one given, and approved by this court, in *Carleton v. State*, 43 Neb. 373, and in *Sarary v. State*, 62 Neb. 166, 171. If the words above quoted were to be considered alone, it would seem that the exception thereto was well taken, but, when they are considered in connection with the other parts of the paragraph complained of, it appears that they are not at all misleading. The substance of the instruction is:

That it is not necessary for the state to prove that the premeditation and deliberation, or the wilful intent and purpose to kill, existed for any particular length of time before the homicide; and the language of the instruction is so plain that there can be no doubt about this. That this is a correct statement of the law there can be no doubt. The principle contained therein is also approved in the case of *Clough v. State*, 7 Neb. 320. We therefore hold, that the trial court did not err in giving the instruction complained of.

Plaintiff's third contention is, that the court erred in giving instruction numbered 7, on his own motion, because it was a repetition of the instruction above mentioned. In *Carstens v. McDonald*, 38 Neb. 858, and in *Carleton v. State*, 43 Neb. 373, 414, it was held:

"That a repetition of the same rule will not be ground for a reversal unless its effect was to mislead or confuse the jury."

It is true that, in the case at bar, the court twice stated, in substance, that no particular length of time prior to the act, during which the intention to kill existed and was deliberated upon, need be shown. But, each time, this was stated in connection with a definition of the elements necessary to constitute the crime of murder in the first degree. The necessity of deliberation and premeditation was impressed upon the jury; but it was also stated that it was not necessary to show that such deliberation and premedi-



tation existed any particular length of time before the killing. These instructions did not, in any manner, conflict with each other, and the jury could not have been misled or confused thereby.

The fourth assignment of error relates to the admission of certain evidence; and counsel complain because one of the witnesses was permitted to testify that he heard the defendant say "He had started one graveyard, and could start another." An examination of the record discloses that this testimony was admitted without either objection or exception on the part of the plaintiff, and it further appears that when the court's attention was called to it, by the plaintiff's motion to strike it from the record, the motion was sustained, and the matter withdrawn from the consideration of the jury. It is a familiar and well established rule that, in order to predicate error on the admission of evidence, there must be an objection and exception thereto. But, in any event, the matter, if at all objectionable, was promptly withdrawn from the consideration of the jury, in compliance with the plaintiff's request.

Lastly, plaintiff's counsel insist that, under the information and the proof, the district court for McPherson county was without jurisdiction to try the accused, and pronounce judgment against him. It is claimed that, while the information charges the crime to have been committed in McPherson county, the proof shows that it was committed in the territory defined by the legislature as Arthur county; that, by law, the unorganized territory defined by the legislature as Arthur county is attached to Keith county for election, judicial and revenue purposes, and that therefore the court had no jurisdiction in or over the territory where the crime was committed. This is the most serious question contained in the record, and requires a careful examination of the statutes in order to determine the merits of the contention. Section 146, article 1, chapter 18 of the Compiled Statutes (Annotated Statutes, 4495), provides:

"That all counties which have not been organized in the

manner provided by law, or any unorganized territory in the state, shall be attached to the nearest organized county directly east for election, judicial and revenue purposes; *Provided*, That Sioux county shall be attached to Cheyenne county for all the purposes provided for in this section; *Provided further*, That if no county lies directly east of such unorganized territory or county, then such unorganized territory or county shall be attached to the county directly south, or if there be no such county, then to the county directly north, and if there be no county directly north, then to the county directly west of such unorganized territory or county."

Section 147 provides: "The county authorities to which any unorganized county or territory is attached shall exercise control over, and their jurisdiction shall extend to, such unorganized county or territory, the same as if it were a part of their own county." Before the legislative session of 1887, all of the unorganized territory within the boundaries of McPherson and Arthur counties lay directly west of Logan county, which was a duly organized county of this state, and was therefore, by law, attached to that county for election, judicial and revenue purposes. The legislature in that year passed an act which took effect March 31, by which the boundaries of McPherson and Arthur counties were defined. Shortly thereafter McPherson county was duly organized, as provided by law, but Arthur county was not then, nor has it since been, organized; and no such county exists, or is known, as a municipal or political subdivision of this state. That part of the territory defined as Arthur county, while it was situated directly west of the territory called McPherson county, and of Logan county, which was a duly organized county of the state, was also situated directly north of Keith county; and it is contended by plaintiff that the moment the legislature defined the boundaries of Arthur county, by operation of law, it became attached to Keith county for election, judicial and revenue purposes. We do not think this contention is sound. As we have seen,

before the passage of the act of 1887, all of the territory described as Arthur and McPherson counties was attached to Logan county. The act of the legislature defining the boundaries of these two counties did not have the effect of detaching either of them from that county. Until the inhabitants living within the unorganized territory, defined and named by the legislature as a county, take the proper steps necessary to organize it and make it one of the political or municipal subdivisions of the state, it is in no sense a county. It is still unorganized territory in which the inhabitants thereof may thereafter organize a county. Therefore, the territory in question remained attached to Logan county, the nearest organized county directly east of it, for election, judicial and revenue purposes, and when McPherson county was organized, which occurred shortly after the passage of the act, the unorganized territory which had been bounded by the legislature as Arthur county became instantly, as a matter of law, attached to that county for those purposes. So that at no point of time was the territory called Arthur county attached to Keith county. A like question arose in the case of *Ex parte Carr*, 22 Neb. 535. Carr was indicted in Cheyenne county in the year 1877, for the murder of one William Love, and was convicted and sentenced to the penitentiary for life. Some years afterwards a writ of *habeas corpus* was sued out to release Carr from his imprisonment. It was found that the place where the crime was committed was within the boundaries of the unorganized territory of Sioux county, which lay directly north of Cheyenne county. At that time there lay to the east of Sioux county several organized counties of this state, and considerable unorganized territory, some of which had been bounded and named, but not organized as counties. Construing the law above quoted, which, with the exception of the proviso attaching Sioux county to Cheyenne county, was in force at that time, this court said:

"Under chapter 10 of the Revised Statutes of 1866, all unorganized counties were attached to the nearest or-

ganized county directly east, for election, judicial and revenue purposes; therefore, where a murder was alleged to have been committed in the county of Sioux, the party accused of committing the same could not be indicted and tried for the offense in Cheyenne county, it being directly south of Sioux county." The court further said in the opinion: "This is not a case where there had been a change of venue, or the court had directed the finding of an indictment in Cheyenne county, if, indeed, it would have had any authority so to do. The prosecution was instituted in Cheyenne county as a matter of right, and was clearly without authority of law. The court thus being without jurisdiction, its judgment is a nullity and is held for naught."

We think this amply sufficient to dispose of the question raised by the plaintiff. But it further appears from the record that some time in the year 1891, and after the organization of McPherson county, a petition was presented to the commissioners of that county praying for an election to determine whether or not the territory of Arthur county should be attached to and become a part of McPherson county; that it was ordered by the board that the question be submitted to the voters at an election to be held November 3, 1891. It further appears that, after the election, the county commissioners found that a majority of the votes cast were in favor of the annexation of Arthur to McPherson county, and, by resolution, it was declared that the territory called Arthur county from and after January 1, 1892, was annexed to, and should become a part of, McPherson county. It does not appear by whom the petition was signed, but it is fair to presume that, in these proceedings, the county commissioners and the voters were acting under authority and by virtue of the provisions of sections 4 and 9 of article I, chapter 18 of the Compiled Statutes (Annotated Statutes, 4422, 4427), by which such proceedings are authorized. It further appears that since the 1st day of January, 1892, as a matter of fact, all of the territory described within the boundaries of both Arthur

and McPherson counties has been considered and treated as McPherson county. This condition has been recognized and approved by every department of the state, and the officers of McPherson county have been elected from that county and from the territory described and bounded as Arthur county, without discrimination. So we hold that the district court for McPherson county had jurisdiction to try, and pass sentence on, the plaintiff. The district court of McPherson county having jurisdiction over the territory described as Arthur county, it was not a material variance, and therefore not reversible error to allege in the information that the crime was committed in McPherson county.

In the case of *People v. Davis*, 36 N. Y. 77, the fourth count of the indictment charged the offense to have been committed in the county of Yates. The proof showed the crime was committed in the county of Seneca, 20 yards across the boundary line between the two counties. The statute gave either county jurisdiction of the offense, and the court held that the offense charged was local, but there was no misdescription of the place at which it was committed; the sales were at the defendant's storehouse in Romulus, and within 20 yards of the county line. For the purpose of criminal jurisdiction, an offense is committed on the boundary line between two adjacent counties if perpetrated within 500 yards of the boundary line, and there was no error in permitting the jury to render a general verdict. In *Willis v. State*, 10 Tex. App. 493, the court held that an offense committed on the boundary of any two counties, or within 500 yards thereof, may be prosecuted and punished in either, and the indictment may allege the offense to have been committed in the county where it is prosecuted. Proof that the offense was committed within 125 yards of a point located by the evidence within the boundary of the county is sufficient proof of the venue of the offense. It would thus seem that there is ample authority for us to hold that the district court for McPherson county had jurisdiction of the offense, and did

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Union P. R. Co. v. Stanwood.

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not err in refusing to direct the jury to return a verdict of not guilty for want of jurisdiction.

From an examination of the record, we are satisfied that the defendant had a fair and impartial trial in a court having jurisdiction of the offense; that the evidence is amply sufficient to sustain the verdict of the jury, and the judgment of the district court is therefore

AFFIRMED.

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UNION PACIFIC RAILROAD COMPANY V. SARAH N.  
STANWOOD.\*

FILED JUNE 4, 1902. No. 11,619.

1. **Evidence as to Value: MOTION TO STRIKE.** The fact that a witness as to values, shown to be competent in that respect, testifies on cross-examination that in making his estimate he took into consideration, besides matters that were proper to be so considered, other matters that were not proper for that purpose, does not entitle a party to have the entire testimony of the witness upon that subject withdrawn from the jury and stricken from the record.
2. **Instructions: WAIVER.** If a party is entitled to have some particular matter affecting the weight or credibility of testimony brought especially to the attention of the jury by an instruction, he waives that right by omitting to ask for such instruction.
3. **Trial: EVIDENCE: ERROR.** When a witness as to the value of real property has testified that he has based his opinion, in part, upon his information as to prices obtained upon sales of other specifically described property in the neighborhood of that in controversy, it is error to exclude evidence of what the prices obtained at such sales actually were.

ERROR to the district court for Douglas county: IRVING F. BAXTER, JUDGE. *Reversed.*

*W. R. Kelly and John N. Baldwin, for plaintiff in error.*

*W. J. Connell and Isaac E. Congdon, contra.*

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\* Rehearing allowed. See opinion, p. 158, *post*.

AMES, C.

This is a proceeding by the plaintiff in error to acquire an easement for right of way and depot purposes in a certain lot in Omaha. The testimony as to values was limited by an order of the court to five witnesses on each side of the controversy. The property owner produced five witnesses, who each testified generally to several years' residence in the city, and to a general knowledge of real estate values in the city, and in the neighborhood of the property in suit and of the lot in controversy itself. In the course of cross-examination it was brought out that their estimate of values was based, not only upon said general knowledge and the uses to which the lot was adaptable, but also upon the prices for which, according to their information, neighboring lots had recently been sold, and upon the revenues which could probably have been derived from the property, in conjunction with a building that might have been erected thereon at an estimated cost. On account of the admitted influence of this last mentioned element upon the judgment of the witnesses, the company moved that their testimony be stricken out. An order of the court denying the motion is assigned for error.

We think the assignment is not well made. The objection went to the weight to be given to the testimony of the witnesses, and not to their competency. The latter had been established by answers to preliminary questions upon the examination in chief and is not shaken by anything elicited, or attempted so to be, on cross-examination. If, in such case, the entire testimony could be excluded because the opinion of the witness appears to have been influenced in some degree by matters impertinent to the inquiry, it might reasonably be apprehended that no witness concerning the value of real estate could be found who could successfully withstand the test. The estimates of values in such cases are in their very nature in a large degree speculative and conjectural, and, in mak-

ing them, different minds will be influenced in varying degrees by a multitude of circumstances. That among such circumstances a competent witness has considered some that he ought to have disregarded, can not properly be held to totally discredit his entire testimony, so as to require the whole of it to be withdrawn from consideration. The case is analogous to one in which the witness is shown, upon cross-examination, to have been mistaken as to some important matter of fact, or even to have wilfully testified falsely. In all such instances, the testimony is not stricken out, but its weight and credibility, under proper instructions from the court, are left to the determination of the jury. That the witnesses in this case were sufficiently shown to be competent is too well established to be shaken, by repeated decisions of this court. *Burlington & M. R. R. Co. v. Schluntz*, 14 Neb. 421; *Omaha Auction & Storage Co. v. Rogers*, 35 Neb. 61; *Chicago, R. I. & P. R. Co. v. Griffith*, 44 Neb. 690; *Mullen v. Kinsey*, 50 Neb. 466.

At the conclusion of the trial the court gave the following instructions:

"Fourth. The jury are instructed that the appellant, Sarah N. Stanwood, is entitled to recover from the defendant railroad company, in this case, the fair market value of the property at the time of its taking, which was on the 10th day of December, 1898. By 'fair market value' is meant the value of the property at the time of the taking, considering its worth for any purpose for which it might reasonably be used in the immediate future, taking into consideration the capabilities of the property, and all the uses and purposes to which it was adapted or to which it might be applied in the immediate future, and any advantage, if any, that the property had, at that time or in the immediate future, by virtue of its position and situation, and for which it was then or in the immediate future available. The 'fair market value' is not what the property is worth solely for the purpose for which it is devoted, nor for the purpose for which the party condemn-



ing it proposes to put it; but it is the highest price the property will bring, at the time of the taking, for any and all uses to which it is devoted and adapted, and for which it is available.

"Fifth. You are further instructed that, in ascertaining from all the evidence in this case the value of said property so appropriated by the defendant company, you can not take into consideration prospective increases in the value of said property, or the improvements to the lots or land, in the immediate vicinity, which were not then in existence or in the course of construction. You can not indulge in speculation or conjecture in arriving at the value of the property so taken."

"Seventh. The jury are the sole judges of the weight of the evidence and the credibility of the witnesses. In passing upon the credibility of the witnesses, it is your duty to take into consideration their appearance upon the witness stand, their manner of testifying, their interest or lack of interest, if any, in the result of the suit, their distinctness of recollection, means of knowledge, the probability or improbability of their statements, and the extent to which they have or have not been corroborated by the testimony of other witnesses, or by facts and circumstances admitted or proved upon the trial. You should not disregard the testimony of any witness unless, for any reason, you find it to be unreliable. If the testimony of the witness appears to be fair, is not unreasonable, and is consistent with itself, and the witness has not been in any manner impeached, then, you have no right to disregard the testimony of such witness from mere caprice or without cause."

It is complained of these instructions, especially that numbered "fourth," that they are erroneous because of omitting to call specific attention to the above mentioned element of joint rental values of ground and building, and failing to tell the jury that such value was not proper to be considered by the witness or by themselves. In the foregoing discussion, we have assumed, without deciding,

that consideration of such conjectural rentals was objectionable for the reasons urged. Continuing upon the same assumption, we do not think the instructions taken together are liable to impeachment. They state the rule for determining the measure of damages, in so far as it can be properly said that there is any such rule, comprehensively and accurately. The plaintiff in error complains that there is a peculiar feature of the testimony, drawn out upon cross-examination, to which it was entitled to have the attention of the jury especially directed, as having a tendency to diminish its weight or call in question its credibility. If so, we think the company waived its right by failing to ask for an instruction treating of that precise matter. Following the analogy above instanced, if one of the witnesses had apparently testified to a wilful falsehood, it would probably not be contended that it would have been the duty of the judge, of his own motion, to advert to the matter in his instructions, further than to say generally that the candor and truthfulness of the witnesses were matters peculiarly within their own province, to be considered in deciding what degree of reliance should be placed upon their testimony. If the party liable to prejudice by the supposed false testimony had desired the court to go further, he might have asked a specific instruction to the effect that, if the jury found that any witness had been guilty of a wilful falsehood concerning any material matter in controversy, they would be at liberty, if they thought the circumstances warranted them in so doing, to reject his testimony in whole or in part, and if, in such case, the request had been denied, there is authority for holding that the refusal might have been successfully assigned for error. So, in this case, upon the assumption mentioned, if the company were of opinion that the improper element of damages so affected the judgment of the witnesses as to seriously impair or to destroy its value, it was their duty to ask a specific instruction concerning it, but, in the absence of such request, we do not think that the failure of the judge to give such instruc-

tion was so serious a sin of omission as to require a reversal of the verdict and judgment.

One other matter remains to be considered. It was elicited upon cross-examination of several of the witnesses for the defendant in error, that their estimate of values was influenced in some degree by the prices for which, according to their information, certain other specified lots in the vicinity of that in controversy had then recently been sold. After the allotted number of witnesses as to values, on both sides, had testified and been excused, the company produced another witness and made the following offer of proof by him:

"I offer Mr. McAllister to prove from his own actual knowledge of the sales in the year, latter part of the year, 1898, and during the year 1899, of the sales in the market, of property, lots in this vicinity, and to whose attention the witnesses for the plaintiff were called upon cross-examination. This witness will not be called for the purpose of giving his opinion as to the value of the lot. It is for the purpose of proving the sales in the market of the lots in question, referred to on the plat, which have been testified to on cross-examination by the witnesses for the plaintiff.

"I desire to offer this witness to prove by him, of his actual knowledge, of the sales hereinafter referred to, being conducted by him as the representative of one, either the purchaser, or vendor, or the owners in question of the lots in question, being either purchased or sold by the Union Pacific Railroad Company in the fall of 1898 and the year 1899; the principal pieces of property of which he has actual knowledge of the sales, terms and conditions, prices, etc., and to which I will ask him directly are: lots 1, 2 and 3 in block 204, part of lots 5 and 6, block 191; lots 7 and 8 in block 192, and lots 1 and 2 in block 231. I say in connection with this offer, that this witness has actual knowledge of the sales; that they were made during the period of time he conducted them for the defendant; and he knows exactly and accurately the amount

paid either by the company in the purchase or the amount received by it when it was vendor."

The offer was, upon objection, refused and the plaintiff in error excepted. In our opinion this ruling was erroneous. The testimony with respect to the prices obtained in these sales would not have been admissible upon direct examination, but was permissible upon cross-examination to test the fairness of the witnesses' opinions as to the value of the property involved in the action, and the degree of their competency to testify as to their value. *Spring Valley Waterworks v. Drinkhouse*, 92 Cal. 528. But how could the test be applied in the absence of evidence showing whether the specific information, upon which the witnesses confessedly relied, was or was not accurate and trustworthy? It is as though a witness to prove an *alibi* should testify that, at the hour when the offense was committed in Omaha, he saw the accused in conversation with some well known person in Lincoln. Can there be any doubt that such person could be produced to testify that the individual with whom he was talking, at the time and place named, was not the accused? The evidence offered did not tend, at least not directly, to establishment of the value of the lot in suit, but to the determination of the weight and significance to be attributed to the testimony of the witnesses who had given their opinions upon that subject. The witnesses had testified to the amount of probable rentals to be derived from the property, after a supposed building of a certain, but general, description should have been erected thereon, and to an assumed cost of such an erection. Suppose that, prior to the trial, such a building had been erected upon the same or exactly similar property similarly situated, would it not have been competent to prove the actual cost of the structure and the actual amount of its net revenues? It seems to us that it would, because by no other means could the test above mentioned have been applied. Conceding that the witnesses in such case properly base their estimates, in part, upon conjectural expenditures and

revenues, it can not, we think, be doubted that their guesses in this respect might be corrected or verified, as the event should turn out, by a comparison with realities. And, by a parity of reasoning, we think that, when witnesses testify as to what they suppose certain lots have brought at specific sales, and that such supposed prices have influenced them in estimating the value of the property in suit, it is competent to show what those prices actually were.

For these reasons we recommend that the judgment of the district court be reversed and a new trial ordered.

REVERSED.

DUFFIE, C., concurring in all save the last point in the syllabus.

I fully concur in the foregoing opinion, with the exception of the point embraced in the last syllabus.

The expert witnesses called by the plaintiff based their opinions of the value of the lot in question, to some extent, on what they had heard and understood had been paid for other lots in the vicinity, sold about the time condemnation proceedings were commenced. It was clearly the right of the defendant to show, if such were the fact, that the purchase price paid for the lots referred to by the witnesses for the plaintiff was less than the amount which these witnesses understood it to be. In this view, the offer as made by the defendant was wholly immaterial, as it was not proposed to show that the purchase price of the lots referred to was less than that which plaintiff's witnesses had said they understood to be the consideration received for them, and on which their opinion of the value of the lot in question was partially based. If the actual consideration paid, or agreed to be paid, for these lots was the same, or greater than the consideration, as understood by plaintiff's witnesses, it is evident that the rejecting of the evidence could not have injuriously affected the defendant.

The following opinion on rehearing was filed February 17, 1904. *Former judgment vacated. Judgment of district court affirmed:*

1. **Evidence as to Value.** The value of real property can not be shown by proof of independent sales.
2. ———: **OFFER.** When a witness as to the value of real estate has testified that he has based his opinion upon the prices obtained upon sales of other specifically described real estate in the neighborhood of that in controversy, an offer of evidence of the prices actually obtained at such sales must include an offer to prove that such prices were in fact different from what the witness, in basing his estimate of value thereon, understood them to be.

POUND, C.

After reading the record and examining the two opinions in this case, I feel constrained to disagree with each, and to take the position that the judgment should be affirmed. While the question is in dispute, the better rule, and the one adhered to in this jurisdiction, seems to be that the value of real property may not be shown by proof of independent sales. Witnesses, who show themselves competent, may give their opinion as to value, and thereupon, on cross-examination may be asked as to particular sales in the neighborhood. *Kerr v. South Park Commissioners*, 117 U. S. 379; 1 Jones, Evidence, sec. 165. But, it is said, if the witnesses to value may be cross-examined as to particular sales in order to test their knowledge, the test must be made effective by permitting further proof as to the facts and circumstances of the sales, so as to determine whether the witnesses correctly understood and stated them. On this ground, it is assumed that there is an exception to the general rule, and that proof of independent sales may be introduced following up such cross-examination. I have not been able to find any authorities in support of this proposition, and I can not accede to it. Every reason for excluding such evidence in the first instance applies to it when offered in support of cross-

examination, to test the opinion of an expert witness. It is obvious that when the sale of a particular tract for a particular price is shown, there are still many facts to consider, which may be very material. The nature of the sale, the situation of the parties, the relation of the lot sold to the one in controversy, and their comparative value, are only some of these questions. From an issue as to the value of the tract in controversy, the cause would soon branch into a series of disconnected controversies as to the facts and surrounding circumstances of an indefinite number of particular sales of other tracts. The parties can not know, until these collateral questions are raised, what they will be, nor are they prepared, always, to go into them in a satisfactory way. In the analogous case of cross-examination to impeach a witness, the cross-examiner must be satisfied with the answer given him, and is not suffered to enter upon an investigation of collateral questions. While I appreciate the desirability of proper opportunities to test expert evidence, I do not think the trial should be turned into a series of detached investigations of collateral questions, merely for this purpose. It is well settled that cross-examination of experts will be allowed a wide range; and this ought to suffice.

I do not think that the answers of the witnesses in the case at bar, on cross-examination, as to how far they took specified sales of certain other lots into account in their estimate of value, are entitled to the effect sought to be given them. None of the witnesses rested their testimony upon these sales. They agreed that such sales were to be considered, but one witness, at least, insisted that the lots in question were not similarly situated to the one in controversy, and the others testified rather to the general value as affected by the reports and current public understanding of the sales, than to the sales themselves.

I should recommend that the former judgment be vacated and the judgment of the district court affirmed.

By the Court: We think the foregoing opinion of Mr.

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Commissioner POUND, together with the dissenting opinion of Mr. Commissioner DUFFIE upon the first hearing, correctly state the law upon the points discussed. The other points involved in the case, we think, are correctly disposed of in the opinion of Mr. Commissioner AMES upon the first hearing, *ante*. p. 150. The evidence offered was not competent as bearing directly upon the question of value of the real estate in controversy. If this were an open question in this state, as counsel for the company, in the brief filed since the last hearing, seems to regard it, the authorities cited and reasons advanced would be well worthy of consideration. *Omaha S. R. Co. v. Todd*, 39 Neb. 818, and *Chicago, R. I. & P. R. Co. v. Griffith*, 44 Neb. 690, both recognize the rule stated by Mr. Commissioner POUND, and, although they are predicated upon a doubtful application of *Dietrichs v. Lincoln & N. W. R. Co.*, 12 Neb. 225, still, upon a question of this kind, they must be regarded as having committed this court to the doctrine which they announce. The third paragraph of the syllabus of the former opinion is incorrect, and is modified to conform to the opinion of Mr. Commissioner DUFFIE above referred to.

The former judgment of this court is vacated and the judgment of the district court is affirmed.

AFFIRMED.

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MYRTLE TINDALL ET AL., APPELLEES, V. CHRISTIAN PETERSON ET AL., APPELLANTS.\*

FILED FEBRUARY 17, 1904. No. 13,389.

1. **Homestead: SALE BY ADMINISTRATOR: VALIDITY.** A homestead of less value than \$2,000 can not be disposed of at administrator's sale either for the discharge of incumbrances thereon, or for the payment of debts against the estate of the decedent, and a license granted by the district court, purporting to authorize such a sale, is absolutely void.

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\* Rehearing allowed. See opinion, p. 166, *post*.



2. ———. A homestead may be composed of contiguous parts of different governmental subdivisions.
3. **Life Tenant: INCUMBRANCES.** As a general rule a life tenant who, in order to preserve the estate, has paid off and discharged an incumbrance upon the fee, is entitled to reimbursement from the reversioners or remaindermen.

APPEAL from the district court for Kearney county:  
ED L. ADAMS, JUDGE. *Reversed.*

*M. D. King*, for appellants.

*G. L. Godfrey*, contra.

AMES, C.

This is an appeal from a decree quieting in the plaintiffs the title to certain real estate. On the 8th day of September, 1887, Thomas Tindall died intestate, and seized in fee of the lands in controversy, subject to two mortgages aggregating in amount \$552.50. He left surviving him a widow, Sarah J., and five minor children. Of the latter, three have since died without issue, and the survivors are the plaintiffs and appellees in this action. At and before the death of Thomas the lands were occupied as a homestead by himself and his family. The widow was appointed sole administratrix of his estate, and applied to the district court for, and obtained, a license to sell the homestead, or so much thereof as should be necessary for the payment of the mortgage debts, and of certain other claims proved and allowed against the estate of the deceased. The order granting the license required the execution of a bond to account for the proceeds of the sale, as is provided by section 75 of chapter 23, entitled "decedents," of the Compiled Statutes (Annotated Statutes, 4949). The administratrix executed such a bond, which was approved by the court, but, before the sale, she resigned her trust, and one Thomas B. Keedle was appointed to succeed her therein. It does not appear that Keedle executed a like bond, though he may have done so; the proceedings were not entered upon the journals of the court, and such pa-

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pers as pertain to them are found among the files of the clerk's office only. The sale, having been advertised, was made by Keedle, at the specified date, to the widow as purchaser, and, upon being reported by him was confirmed by the court, and a conveyance was executed pursuant to it. Of the purchase price, \$800, a sufficient amount was applied to the satisfaction of the mortgage liens and the procuring of their release, and the residue to the payment of claims allowed against the estate of the deceased. The money used for these purposes was procured by means of a new mortgage upon the premises for \$800, executed by the purchaser, the widow. Afterwards, she conveyed the premises as in fee, subject to the mortgage, to one Windover, and then married him. Subsequently she died, and the lands came by mesne conveyances from her grantee to the defendants and appellants in the action. There is no question of laches or limitations involved. One of the plaintiffs, who appears by guardian, has not yet attained to his majority, and the other, at the beginning of the suit, had done so but recently.

The district court adjudged all the above mentioned proceedings and conveyances to be void, and to be canceled, and quieted the title to the premises in the plaintiffs. That they were ineffectual to convey the legal title or to deprive the heirs at law of their reversionary estate in the lands, we are ourselves convinced. It has been held by this court, that the estate which vests in the widow and children, in lands selected from the property of the husband, and occupied as a homestead at the time of his death, is absolute, and can not be lost by abandonment, or divested by sale upon execution on a judgment against the husband. *Durland v. Sciler*, 27 Neb. 33; *Baumann v. Franse*, 37 Neb. 807.

In *Guthman v. Guthman*, 18 Neb. 98, the court go so far as to say, in effect, that the homestead estate can not be conveyed or alienated by the widow, in any manner, during the minority of the children, or of any of them, and it appears to us that such is the correct doctrine, because,

otherwise, the heirs of the husband might be deprived of their reversionary interest, which is set apart and exempted to them by the statute, in as unequivocal terms as is the homestead interest itself. The principle of these decisions was reaffirmed in *Cooley v. Jansen*, 54 Neb. 33, where it was again expressly held that a sale of the homestead by an administrator, under a license for the payment of debts, is without authority of law, and that an administrator is not entitled to the possession, or to the rents and profits of the homestead, although its use, as such, has been abandoned. It is true that, in these cases, objection was made in the very proceedings by which the homestead was sought to be appropriated, instead of by collateral attack as in this case, but we think that circumstance can make no difference. The proceeding by an administrator to appropriate lands belonging to the estate to the payment of debts, contracted by the deceased in his lifetime, is correctly described by counsel for appellants as a proceeding *in rem*, but the very principle which is the foundation of the foregoing decisions, and from which they proceed, is that the administrator has neither title nor right of possession of the homestead, and therefore he can confer upon the court no jurisdiction over the same. It is, moreover, difficult to understand how minor children, often, as in this instance, of very tender years, can have any opportunity to object to such a proceeding after arriving at years of discretion, except by collateral attack. The statute does not save to them the right of direct impeachment by appeal or error after attaining their majority, and if they can not assail the proceedings indirectly, all that is requisite to deprive them of their estate is the connivance or collusion of the mother, who in most cases is their legal as well as their natural guardian. Neither do we think that the fact that the greater part of the proceeds of the sales was applied to the payment of the mortgage liens, was effectual to supply the want of jurisdiction. The mortgage debts had not been admitted or allowed in probate, and unless and until they

had been so, at least, the administrator, as such, had no interest in or concern with them. Even if they had been so, the statute, which furnishes the exclusive measure of his powers and duties, confers neither upon him, nor upon the district court, in probate proceedings, any authority to provide for their payment by a sale of the homestead. He has no duty to perform with respect to the homestead except, in proper cases, to see that it is correctly ascertained and set aside. The proceedings were so grossly irregular and faulty in several respects that their validity could, in any event, have been maintained with difficulty, if at all, but, the court having been without jurisdiction of the subject matter, it is not worth while to discuss them.

But there is a further contention that only a part of the lands sold were included within the homestead exemption. There are two 80-acre tracts, being, respectively, parts of different governmental subdivisions, but contiguous along their whole length, and separated only by an imaginary line. The dwelling house and other buildings and appurtenances were all on one of these tracts, but both were used and cultivated, indiscriminately and together, for the support of the deceased and his family, and the combined value of the two was very much less than \$2,000, the amount exempted by the statute. The act exempts "the dwelling house in which the claimant resides and its appurtenances, and the land on which it is situated, not exceeding 160 acres," etc., and it is argued that, as the buildings were situated upon one only of these tracts, that alone constituted the homestead, and there are cited in the brief of appellants certain authorities which seem to support this view. *Woodman v. Lane*, 7 N. H. 241; *Kresin v. Mau*, 15 Minn. 87, but we think that the greater weight of authority, and the better reason, incline to the contrary opinion. *Clements v. Crawford County Bank*, 64 Ark. 7, 62 Am. St. Rep. 149; *Hodges v. Winston*, 95 Ala. 514, 36 Am. St. Rep. 241; 15 Am. & Eng. Ency. Law (2d ed.), pages 586, 587 and citations.

The statute does not use the word tract or its equiva-

lent, and says nothing about governmental surveys, and in our opinion the latter are not of controlling importance. The owner of the land has as good a right to define the word tract, as applied to his holdings, as has his predecessor in title. In such cases the uses to which the lands are put, and the nature and circumstances of their cultivation, and the manner of the application of their produce, are more significant of the intent of the claimant and of the real character of his occupancy, than are the surveys and monuments of their former owners.

But upon the facts disclosed by this record the appellants are not wholly without right in the premises. The statute and the selection of the homestead vested in the widow, upon the death of her husband, an estate for life, leaving a reversion in the heirs of the latter. There is no evidence of fraudulent intent on her part, or on the part of her grantees, by direct or mesne conveyance. The proceedings to which she became a party eventuated, not only in preserving her life estate, but in relieving the fee of an incumbrance which not improbably might have extinguished the reversion, and it is not unlikely that by such means she was enabled to rear and educate the children with greater comfort and care than she could otherwise have done. It is a general rule, subject to exceptions not applicable to the case at bar, that a life tenant, who in order to preserve the estate pays off an incumbrance upon the fee, is entitled to reimbursement from the reversioners or remaindermen. In accordance with this rule the appellees ought not to be let into possession until they have discharged this equitable burden—that is, until they have paid, or have secured by a lien or charge upon the premises, the amount paid in satisfaction of the mortgages existing at the death of their father, with 7 per cent. annual interest on that amount from the date of the payment. The court found that the value of permanent improvements put upon the lands by the appellants equals the value of the use and occupation of the premises since the demise of the widow, so that a further accounting for

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rents and profits is uncalled for, but, inasmuch as the rights of the parties can be best adjusted in the neighborhood in which the lands lie and the parties reside, and considerable time may be requisite for effecting that purpose, it is recommended that the judgment of the district court be reversed and the cause remanded for further proceedings in accordance with law, and that each party be taxed with their own costs up to this time.

HASTINGS and OLDHAM, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, it is ordered that the judgment of the district court be reversed and the cause remanded for further proceedings in accordance with law, and that each party pay their own costs to this date.

REVERSED.

The following opinion on rehearing was filed May 5, 1904. *Former judgment of reversal modified:*

1. **Life Tenant: REVERSIONER: INCUMBRANCES.** Ordinarily, a life tenant who pays off an incumbrance upon the fee, will be entitled to be reimbursed by the reversioner or remainderman the amount so paid, less such sum as will equal the present value of the annual installments of interest he would have paid during his life, if the incumbrance had remained so long in existence, with lawful interest on the residue, so ascertained, from the date of payment.
2. **Minors: EQUITY.** Although minors may not be bound either by contract or by estoppel, equity will not lend its affirmative aid to enable them to take an unjust advantage of the mistakes or misfortunes of their adversaries.

AMES, C.

This case is before us on a motion in form for a rehearing, but which in fact calls for nothing more than a modification of the former decision of this court. The accuracy of the statement of facts in the former opinion, *ante*, p. 160, is not questioned, and it is not necessary to repeat them here. The first ground of the motion, which is by

the reversioners, appellees, is that the decision complained of improperly requires them to pay interest on the amount of the incumbrance on the premises at the time of the death of the father, between the time it was discharged by the life tenant, the mother, and her death. How considerable this interval was, is disclosed by none of the briefs, and as affecting the principle involved is perhaps immaterial. The subject matter of the equitable right of reimbursement on account of the payment of this lien, was not touched upon at the original hearing, so that we were both imperfectly informed as to the circumstances, and without the aid of counsel in the ascertainment of the principles applicable to the case.

There seems to be no question that the duty of a life tenant to preserve the premises from waste, includes the obligation to keep down the interest upon existing incumbrances. In case he pays the principal, the rule generally adopted is that the burden is apportioned between him and the reversioner or remainderman in such manner as that the tenant will "pay such a sum, as would equal the present value of the amount of interest he would probably have paid during his life, if the mortgage had continued so long in existence." Tiedeman, Real Property, sec. 66. Or, as is said in *Moore v. Simonson*, 27 Ore. 117, "The life tenant must pay the present worth of an annuity equal to the annual interest running during the number of years which constitute the expectancy of life, the balance, after subtracting the sum thus ascertained from the incumbrance, should be borne by those in remainder." 1 Washburn, Real Property, (4th ed.), \*96; 1 Story, Equity Jurisprudence (13th ed.), sec. 487; 3 Pomeroy, Equity Jurisprudence (3d ed.), sec. 1223.

But it is suggested that the right of contribution is personal to the life tenant and expires with the termination of her estate, or, at most, survives to her personal representative and can not be availed of by her successors in the possession of the premises. Ordinarily, this is perhaps true, but the right is one of equitable creation, and the

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authority that brought it into existence is doubtless competent to mold and modify it in its application to particular cases, in such manner that it shall not miss its original purpose of doing justice between the parties. As was said in the former opinion, there is no question of good or bad faith involved, and the arrangement by which the former incumbrance was discharged and the premises transferred to Windover, the second husband of the mother, was without doubt beneficial to her children who are the present complainants. The first mortgage was satisfied and the second mortgage was void, but the latter was accompanied by the personal obligations of the supposed purchasers whose conveyances were, perhaps, effectual to convey the life estate of the widow, and who satisfied the debt. In good faith they stepped into the shoes of the widow as respected her duties and obligations toward the land, and with regard to it toward the reversioners, and equity and good conscience require that they should be treated as having succeeded to her rights. Whether or not, practically, the same result might be worked out under the doctrine of subrogation, pure and simple, we are not interested to inquire.

To the proposition that the reversioners are not chargeable with the value of the lasting and valuable improvements in an accounting for the value of the use and occupation, we are unable to give our assent. As we have said and repeated, there is no suspicion of intentional wrong doing, but an appearance to the contrary, and, although it may be true that the heirs being minors can not be held to pay for benefits either by contract or estoppel, yet we think that, under the circumstances of this case, a court of equity will not lend its affirmative aid to enable them to profit by the misfortunes or mistakes of their adversaries.

We are of opinion that justice, as complete as possible, will be done between the parties, by so modifying the former decision of this court as to charge the appellants, as of the date when the first mortgage was paid off, with a



sum equal to the then present value of the amount of interest the life tenant, the mother, would have been required to pay during the actual continuance of her life, as shown by the record, and that the reversioners, the appellees, be required, before being let into possession, to pay, or charge as a lien upon the premises, the residue of the sum paid for the discharge of the mortgage, with 7 per cent. interest from the date of payment.

OLDHAM, C., concurs. HASTINGS, C., not sitting.

By the Court: It is ordered that the former decision of this court be so modified as to charge the appellants, as of the date when the first mortgage was paid off, with a sum equal to the then present value of the amount of interest the life tenant, the mother, would have been required to pay during the actual continuance of her life, as shown by the record, and that the reversioners, the appellees, be required, before being let into possession, to pay, or charge as a lien upon the premises, the residue of the sum paid for the discharge of the mortgage, with 7 per cent. interest from the date of payment.

JUDGMENT ACCORDINGLY.

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DAVID BRADLEY & COMPANY V. JOSEPH BASTA ET AL.

FILED FEBRUARY 17, 1904. No. 13,403.

1. **Contracts: PRESUMPTIONS.** In the absence of fraud or imposition, persons of mature years and ordinary intelligence and education are presumed to have read the contracts executed by them, or to have otherwise made themselves acquainted with their contents.
2. **Agents: POWERS: LIMITATIONS.** A person dealing with an agent of limited powers, and who knows of the nature and extent of the limitation, is bound thereby.

ERROR to the district court for Colfax county: CONRAD HOLLENBECK, JUDGE. *Reversed.*

*Flickinger Brothers*, for plaintiff in error.

*George H. Thomas*, contra.

AMES, C.

This is a proceeding in error to reverse a judgment rendered in behalf of the defendants. The action is to recover the purchase price of a gasoline engine sold and delivered upon a written contract. The contract is in the form of an order, which was obtained by the solicitation of an agent of the plaintiff, and is signed by the purchasers alone. It calls for an engine of certain specified number of horse power, and contains specific warranties as to material, construction and capacity to develop the specified power, and stipulates that it shall not be modified, nor any promises of agent, employee or attorney, not contained therein, be effectual, unless "in writing and ratified by the Council Bluffs office," the plaintiff's principal place of business. The document appears upon its face to express the entire agreement of the parties and to be complete in all respects. It was sent to, and received and accepted by, the principal managers of the plaintiff company, who shipped and delivered the engine accordingly, but the defendants refused to pay for the same. The defendants, however, contend that the delivery was not complete, because the contract stipulates that they shall have opportunity to ascertain whether the engine is in compliance with the terms of the warranty, and that, upon the application of certain practical tests, it has been ascertained that it is not so. But the alleged warranties, of a breach of which they complain, are not contained in the written contract, but are averred to have been made orally by the agent of the plaintiff antecedently to and contemporaneously with the signing of the latter. Or, more accurately speaking, it is alleged that the agent represented to them that the engine would be capable of making a certain number of revolutions a minute, and of causing a

certain number of revolutions a minute in a certain separator (threshing machine) belonging to them, and assured them that, if it should fall short of these representations in either respect, or of successfully and satisfactorily driving and operating the separator, the defendants should be under no obligation to receive or accept the engine, or to pay any sum for or on account of it, and that these statements and promises were the sole inducement to the defendants to execute and deliver the contract or order. It was further averred that it has been ascertained, by practical experiment and attempted use of the engine, that it is in a large degree incapable in all the respects mentioned, it being of the 10 horse power capacity stipulated in the contract, and the separator being a 16 horse power machine. All these oral representations are denied by the reply, and due exception was taken at the trial, both generally and specifically, to the introduction of evidence in proof of them. It is not claimed that they were fraudulently made, or that they were known to the plaintiff company until after the delivery of the engine, or that they were ratified by it in writing or otherwise, or that there was any mistake as to the contents of the written document, or that the engine did not answer the description therein given. There has been no offer to rescind or to return the engine, which is still retained by the defendants.

It will thus be seen that the alleged antecedent and contemporaneous oral agreement not only supplemented but, in important particulars, was inconsistent with, and superseded the written instrument. Indeed, if the defendants' version of the transaction is accepted, the real and substantial contract of sale was oral, to which the writing was only an incident; and, in support of this theory, they allege and testify that they finally consented to sign the latter and permit its transmission to the plaintiff, because of being assured by the agent that it would not modify or affect the oral agreement, but he said: "Boys, I wouldn't ask you to sign this order, but I've got to have it to get the

engine up here. The company will not ship it without." This statement was, we think, additional to the above quoted clause in the writing, a distinct and explicit notification to the defendants that the agent was exceeding his powers, and that the only contract or agreement of sale he had authority to make was that contained in the writing. It particularly challenged their attention to that document, and was equivalent to saying to them: "My principal has authorized me to make or accept a particular contract or agreement of sale and no other. The terms and conditions of that contract you will find recited herein, and anything other or different therefrom, the company will decline to consider." If, in response to this challenge, the defendants had read the instrument (and it does not appear that they did not do so), they could not have failed to observe therein the limitation upon the powers of the agent, denying to him in express terms authority to make any different, additional or supplemental agreement, whatsoever. The most that he could have done in that regard was to propose something new in writing, leaving it to his principal to accept or reject the same at its pleasure. It is a maxim of law that persons of mature years and ordinary intelligence and education, such as the defendants seem to have been, are presumed to have read the contracts executed by them, or to have otherwise made themselves acquainted with their contents. The inference is inevitable. The defendants must, upon this record, be conclusively presumed to have known that the alleged oral agreement with the agent was in excess of his powers, and that the writing, if it should be accepted by the plaintiff, and a delivery of the engine should be made pursuant to it, would furnish the complete and exclusive measure of the rights and liabilities of the parties to the transaction.

It is recommended that the judgment of the district court be reversed and a new trial granted.

HASTINGS and OLDHAM, CC., concur.

By the Court: For the reasons stated in the foregoing

opinion, it is ordered that the judgment of the district court be reversed and a new trial granted.

REVERSED.

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DEWITT Y. DORWART V. JOHN H. BALL.

FILED FEBRUARY 17, 1904. No. 13,414.

1. **Partnership: ACTIONS.** A partner's share of a single item of partnership profits, the result of a single transaction, may be recovered of a copartner who is retaining it, by an action at law, if all the other partnership dealings are settled between the parties.
2. **Directing Verdict: EVIDENCE: ERROR.** When plaintiff's evidence tends to establish such a state of facts, and was admissible under the pleadings, it is error to instruct the jury to return a verdict for defendant.

ERROR to the district court for Saline county: GEORGE W. STUBBS, JUDGE. *Reversed.*

*R. M. Proudfit*, for plaintiff in error.

*J. D. Pope*, *contra*.

HASTINGS, C.

In this case, plaintiff sues to recover \$50, which he alleges to be due on account of one-half of commissions earned by himself and defendant as real estate brokers, in partnership; he alleges a partnership existing between the parties on December 10; that on that day the \$100 was paid in; that the defendant refused to pay over any share of it, but that on December 13 an accounting was had between the partners and all partnership debts paid in full, the partnership dissolved, and the \$50 was then found due; that it has not been paid and judgment is asked for it, with interest from December 13, 1901. The answer denies all of the plaintiff's allegations; alleges that plaintiff bought out a former partner of defendant, and was

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never himself accepted as such partner; that, during the time from December 1, 1901, to December 9, plaintiff remained about the office a part of the time but had no part in the business; that on December 9 plaintiff was told that he could not remain in the business, nor receive any share of the receipts; that after that date plaintiff attempted to take no further part in the business. A special denial of any settlement of firm accounts or firm indebtedness, and a denial of any contribution toward firm expenses by plaintiff, is also interposed. After hearing the evidence, the trial court instructed the jury to return a verdict for the defendant. A motion for a new trial was overruled and judgment entered on the verdict, from which the plaintiff brings error, and he now insists that his case should have been submitted to the jury. The defendant says that there is no evidence, either of a settlement of partnership accounts or of any receipt on defendant's part of the \$100. The evidence by plaintiff indicates that on December 2, 1901, with the consent of Mr. Ball, and under agreement with the latter that he should have the rights of a partner, he purchased from C. M. Druse one-half interest in the firm of Druse & Ball, real estate, insurance brokers and loan agents; that the arrangement continued until the 13th of the same month, when it was dissolved; he testifies that there was one sale made of 160 acres of land, "and the commission for selling this was \$100"; that, on a settlement had, Mr. Ball agreed to pay all of the office expenses, and that during the 11 days of plaintiff's connection with the business the only thing bought was some coal, which plaintiff purchased; that he sold to Ball his interest in the furniture for \$45. The \$50 commission was not agreed to be paid, Ball claiming that it really belonged to him, and, when plaintiff demanded it at the time of the settlement, declared he would not pay it until he had to. Mr. Littlefield, the purchaser of the land, says that Mr. Dorwart was introduced by Ball as being the latter's partner. It appears that Littlefield went to see the land, as Dorwart testified; he does not remember

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the date, which Dorwart says, and Ball does not deny, was December 5, but it was in the forepart of December; that on the following day he closed the contract for the land; that he did this with Mr. Ball, who told him to say nothing about it to Mr. Dorwart, because he was going to dissolve partnership with the latter; that he paid at the office of Dorwart & Ball some money on the land contract. The other testimony seems to identify this payment as made on December 7. Defendant's account of the matter is that, at the time of the alleged settlement, he made Dorwart an offer to take the furniture and continue on in the same place, or for Dorwart to do so. "I said to him, I will take \$50 for my share of the furniture, or I will give you \$50 for yours and you can get out of the office, and I then told him that from that time on what he did was his, and what I did was mine, he was to keep all that he made and I was to keep all that I made."

Q. Now, was there anything at that time said about the expenses of the office, and partnership accounts?

A. No, sir. Defendant says that no disposition of the insurance business was made, and that the \$45 was for the furniture; that Mr. Druse had the agency for some of the insurance companies, and himself, Ball, some; that he tried to get Druse's agencies transferred to Dorwart; that Dorwart at that time wanted this \$50 from the Littlefield commission.

As to this the testimony is as follows:

Q. Was there anything said by you at this time about the \$50?

A. He wanted me to give it to him.

Q. Did you agree to give it to him?

A. No, sir.

Q. What did you say about it?

A. I said it was made after we had dissolved.

Mr. Ball denies making settlement with Dorwart as to the office expenses; he admits, however:

Q. And you assumed the office expenses?

A. Yes, sir, but there was nothing said about this at the time of the settlement.

By the Court: Q. Was there anything said about this matter at any time?

A. No, sir.

He says that Dorwart said nothing about the rent; that he does not know whether or not stationery was bought. Mr. Ellsworth, the justice of the peace, who dismissed the case on the evidence, for lack of jurisdiction, after a jury was impaneled, was called and testified that Dorwart, in the trial before him, did not testify to any settlement with regard to expenses.

It seems clear that the foregoing evidence shows as to the receipt of the \$100 commission, enough, standing uncontradicted as it does, to sustain a verdict finding that the \$100 had been paid to Mr. Ball before Dorwart surrendered his interest in the business. As above stated, it seems from statements of Ball and Dorwart, and the purchaser, Mr. Littlefield, that the transaction must have been closed on the 7th, and the sale of the office furniture to Ball by Dorwart seems to have been upon the 11th. At least, that is the date under which Dorwart receipted for the \$45 payment. There is nothing to indicate that there is any further outstanding claim against the partnership. It is expressly declared by both Ball and Dorwart that the only item of business done, out of which any profit could come, was this sale to Littlefield of the Stowell land. In this state of affairs it seems clear that, if it was true, as Dorwart testifies, that there was a settlement, and that Ball agreed to take the furniture at \$45 and to settle the expenses, there could be nothing left to settle as to this partnership business except the one item of \$100 of earnings, as to which Ball refused to give up any part, on the ground, as he himself says, that it was "made after they had dissolved."

To sustain the instruction for a verdict for defendant, we must assume all the facts indicated by plaintiff's evidence to be true, and still find that there is no cause of action. Assuming all the facts as true to which Dorwart testifies, a sale of his interest in the property, except five



chairs and a desk, which he took out, an agreement by Ball to pay office expenses during the time Dorwart had been in, a dissolution of the partnership, and the fact that this \$100 was the only money earned during the partnership and that it had been paid in as above indicated by Littlefield's testimony, and by Ball's admission that it had been made, but after the partnership had been dissolved, do these facts entitle Dorwart to sue at law for the \$50. It should be added, that it clearly appears that the partnership relation existed and was that of equal partners. Dorwart's own testimony, if taken as true, with Littlefield's and Ball's, would warrant a finding that there was a final settlement of the partnership business and accounts, except as to the division of the \$100 commission, and that Ball received the \$100. Can the question as to whether or not this money was really earned by the partnership be determined in an action at law between the partners? Of course, if we were to hold to the old doctrine, which required an express promise to pay a balance due in order to make it recoverable in an action at law from one partner by another, there could be no possibility of any recovery in this action.

There certainly does not appear to have been any promise made by Ball to pay this money. It is equally clear that there was no settlement and balance struck which would raise an implied promise to pay it. The obligation to pay it was explicitly repudiated by Ball.

The only ground on which a recovery could be had is one which is not expressly pleaded in plaintiff's petition, but one on which he should be allowed to recover, as the evidence is not objected to on that ground, if the ground itself is tenable. If a suit at law will lie for one single item of partnership profits, when it appears that everything else relating to the partnership has been settled, then, this case should have gone to the jury. A finding that this \$100 commission on the sale of the Stowell land was the only item of partnership business unsettled, that Ball received it, and that it was partnership earnings, would have to be

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sustained on this evidence, though Ball denies some of the statements.

Will an action at law lie for a single item unsettled in partnership accounts, when everything else has been disposed of? This question is not raised in the briefs, and was not on the argument of counsel. It is clearly against the technical reason for refusing to permit partners to sue for unsettled and undivided profits. Such profits belong to the firm though in the hands of a member. The recovery by any one must be against the firm, and a member can not be permitted to sue himself.

There are, however, many cases intimating, and some holding, that when the dispute is narrowed down to one item, a suit at law may determine it. Mr. Bates says (2 Partnership, sec. 865), that these are cases of single ventures and not properly partnerships, and so not subject to the rule as to partnership. *Mason v. Sieglitz*, 22 Colo. 320, is placed on that ground, and also that the suit for a single item is a clear right. In 15 Ency. Pl. & Pr. 1031, it is stated that an action at law, after dissolution, will lie for a share of a single item of partnership profits, "because in such a case there are no equities to be adjusted, and no accounting is necessary as would be the case had there been no settlement." It cites *Fcurt v. Brown*, 23 Mo. App. 332, and the numerous Massachusetts cases holding that such an action will lie, when judgment for the amount claimed will be an entire termination of partnership transactions. *Brinley v. Kupfer*, 23 Mass. 179; *Wilby v. Phinney*, 15 Mass. 116; *Buckner v. Ries*, 34 Mo. 357; and *Whetstone v. Shaw*, 70 Mo. 575, might have been cited also.

In *Pettingill v. Jones*, 28 Kan. 749, it was held no error to refuse to instruct that plaintiff could not recover at law for profits of an alleged partnership, except after an accounting and settlement. That case, however, seems to have been one of a single venture. The present case, while showing only one item of earnings, relates to an undoubted partnership, though a brief one. A still

stronger case for plaintiff is *Clarke v. Mills*, 36 Kan. 393. See also 2 Bates, Partnership, sec. 866 and cases cited.

In *Lord v. Peaks*, 41 Neb. 891, a suit brought by one partner to recover from the other, for loss to the firm by reason of the defendant's engaging in other employments, contrary to an alleged partnership agreement, and for expense by the plaintiff in procuring the services of an expert accountant, rendered necessary by the negligence of defendant in keeping the firm's books, was dismissed on demurrer because no settlement of the partnership accounts was alleged. At the close of the opinion, the court refers to the claim that a dispute over a partnership transaction, involving but a single item, may be settled at law after everything else pertaining to the partnership has been settled, and says some of the cases so hold, but that there were no allegations bringing that case within the rule.

In the present case, it is sufficiently alleged that the other matters involved are settled. In fact a settlement as to the \$100 and the finding of the \$50 to be due plaintiff are alleged, but, in our view, this allegation might and should be treated as surplusage, if without it plaintiff has a cause of action. The general rule, as broadly laid down in *Lord v. Peaks*, *supra*, and in *Younglove v. Liebhardt*, 13 Neb. 557, of course, is that nothing can be recovered by one partner from another as to which the partnership relation must be invoked as the basis of the action. It must be due on a settlement agreement or on an assumpsit. The latter is given by the Massachusetts court in *Sikes v. Work*, 6 Gray (Mass.), 423, as the ground of allowing a recovery on a single item where everything else is settled, "Nor is it necessary that this (the balance due) should be a fixed, ascertained balance, as a result of a settlement of the accounts of the firm between the partners. It is enough if it appear that the firm is dissolved and that there are no outstanding debts due to or from the copartnership, so that the action of assumpsit to recover the balance due one of the firm will effect a final settle-

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ment between the copartners." Citing *Wilby v. Phinney*, 15 Mass. 116; *Williams v. Henshaw*, 11 Pick. (Mass.) 79, and 12 Pick. (Mass.) 378; and *Capen v. Barrows*, 1 Gray (Mass.) 37. *Fargo v. Saunders*, 4 Allen (Mass.), 378, and *Gomersall v. Gomersall*, 14 Allen (Mass.), 60, are cited to the same effect in the note to *Williams v. Henshaw*, 12 Pick. (Mass.) 378, 23 Am. Dec. 614.

As is said by Commissioner IRVINE in *Glade v. White*, 42 Neb. 336, in a suit for partnership moneys discovered after a settlement to have been collected and unaccounted for by the partner who was transferring the accounts to his associate, the partnership transactions are alleged merely as inducement; the action is for money received which, *ex æquo et bono*, belonged to plaintiff. The cases applying the general rule are to be found collected in 38 Cent. Dig., col. 1789, and following. So far as we have been able to examine them, none of them deny, though some of them criticise, the holding that a partner's share of a single item of partnership profits, where everything else is settled up, can be recovered in an action at law.

It is recommended that the judgment of the district court be reversed and the cause remanded for further proceedings according to law.

AMES and OLDHAM, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is reversed and the cause remanded for further proceedings according to law.

REVERSED.

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JOHN B. OSBORNE V. MISSOURI PACIFIC RAILWAY COMPANY.

FILED FEBRUARY 17, 1904. No. 13,235.

1. Action: FRAUD. The general rule is that, where ordinary prudence would have prevented the deception, an action for the fraud perpetrated by such deception will not lie.

2. **Personal Injuries:** RELEASE: ESTOPPEL. A party who, having the capacity and opportunity to read a release of claims for damages for personal injuries signed by himself, and not being prevented by fraud practiced on him from so reading it, failed to do so, and relied upon what the other party said about it, is estopped by his own negligence from claiming that the release is not legal and binding upon him according to its terms.

ERROR to the district court for Douglas county: LEE S. ESTELLE, JUDGE. *Affirmed.*

*Connell & Ives and John Q. Burgner*, for plaintiff in error.

*B. P. Waggener, James W. Orr and John F. Stout*, *contra.*

OLDHAM, C.

In this action the plaintiff in the court below, who is also plaintiff in error in this court, filed a petition in the district court for Douglas county, Nebraska, alleging that, while in the employ of the defendant railway company as a switchman in its yards at Omaha, he received serious personal injuries caused by the negligence and carelessness of defendant. It is not necessary to review the petition further than to say that, on its face, it stated a good cause of action. Defendant answered this petition, denying all the allegations of negligence, and pleaded, by way of accord and satisfaction, the payment of \$200 to the plaintiff in settlement and full satisfaction of all injuries received on account of the accident, and the execution of a release in writing signed by the plaintiff and delivered to defendant at the time of the settlement. It is not necessary to set out at length the release, but sufficient to say that, on its face, it shows a perfect accord and satisfaction of the injuries sued for. Plaintiff, by way of reply to the plea of accord and satisfaction contained in defendant's answer, alleged, in substance, that he signed the release alleged in defendant's answer, and that he had received \$200 at the time stated, but, that his signature to the re-

lease was procured by fraud and misrepresentation; that after he had recovered from the injury he applied to defendant's superintendent at Omaha for further employment; that the superintendent informed him that he had a position for him, but that it was necessary for all employees who had been injured, to go to the general office at St. Louis and see one Jones, from whom the superintendent at Omaha would be authorized to give him further and continuous employment. That pursuant to these directions, the plaintiff went to St. Louis and called upon the said Jones, who was the general claim agent of defendant; that Jones thereupon represented to him that he could use his services, and that there was a vacant place ready for him at Omaha, of which fact he had just been informed by a telegram from the superintendent at Omaha, and said he would allow plaintiff \$2 a day for 100 days' services, the amount of time he had lost on account of his injuries, but not as damages, because defendant was not liable to plaintiff at all for the injuries. That Jones, thereupon, prepared the papers which he said were to that effect, and stated that the signing of the papers would provide plaintiff with all the employment desired. And, quoting now literally from the reply: "Thereupon, plaintiff believing said representations made as hereinbefore set forth to be true, and relying upon the same, signed his name to such papers as the said Jones directed, but without reading over the same or hearing them read, or knowing the contents thereof otherwise than stated by said Jones, as aforesaid; and plaintiff avers, that he was caused to believe and rely upon said representations, and to sign said papers in manner aforesaid, partly, by undue influence exercised upon him by said Jones, he, the said Jones, having acquired plaintiff's implicit confidence, purposely and with the intent, as plaintiff believes, of gaining improper advantage thereby." Plaintiff then alleges, that after his return from St. Louis in March, 1895, he applied to defendant for employment, and was put off from time to time until July, 1895, when he was given employment

either all or part of the time until February, 1896, when, without notice or just cause, he was discharged from defendant's employ. The reply further sets out, that the consideration on his part for signing the agreement was the promise of defendant to furnish him permanent employment in its service. It further sets out, that if the court and jury deem it proper they may take into consideration the \$200, received in part payment of defendant's liability. After the filing of this reply, defendant moved for judgment on the pleadings. Pending the hearing of this motion and before judgment sustaining the motion was entered, plaintiff asked leave to file instantaner an amended reply which, however, did not materially change the allegations as to procuring his signature to the written release. The court denied the request to file an amended reply, directed a judgment for defendant on the pleadings, and plaintiff brings error to this court.

The sustaining of the motion for judgment on the pleadings concedes the truth of every fact well pleaded in plaintiff's reply. The question then arises, do the facts pleaded sufficiently excuse plaintiff's neglect to read, or have read to him, the release which he signed before accepting the \$200?

The general rule is that, where ordinary prudence would have prevented the deception, an action for the fraud perpetrated by such deception will not lie. Now, construing liberally the allegations of the reply which charge fraud in procuring the signature to the release, they are that plaintiff desired permanent employment with defendant; that he was led to believe from a conversation with defendant's claim agent that, on signing the release tendered him, he would get \$200 for his lost time, and permanent employment in defendant's service. The reply does not allege that plaintiff could not read and write, and in fact the record clearly shows that he could, for his name is signed twice in his own handwriting to the release. It is not alleged that, by reason of failing eyesight, or by reason of any disability, he asked the defendant's agent to read

the paper to him; nor is it claimed that he was too ignorant of the language to understand the purport of the release, had it been read to him. We can not find any case that goes so far as to relieve one from the effects of a written contract, which is signed by a person of ordinary intelligence who can read and write, and who, presumably, would know the contents of the instrument if read to him, where no art or deception was practiced upon him to prevent his reading of the contract, or having it read to him, before the signature was obtained.

The rule permitting release from signatures obtained by fraud has been as liberally construed in this jurisdiction as it has by any other courts of last resort in these United States, and we will notice briefly some of our own decisions on this question:

In *Cole Brothers & Hart v. Williams*, 12 Neb. 440, the defendant had signed a contract for certain lightning rods, which were alleged to have been represented as of a stipulated price. Defendant could read and write, but had not his glasses with him, and requested plaintiff's agent to read the terms of the contract. This the agent did, and misstated the price to be charged for the lightning rods. Other witnesses were present and testified to the transaction. Under these conditions, defendant was released from the contract because of the fraud perpetrated in procuring his signature.

In *Ward v. Spelts & Klosterman*, 39 Neb. 809, the defendant could neither read nor write, and alleged that his signature to a memorandum in writing was procured by fraudulent representation as to what the paper contained. This he was permitted to show.

In *Woodbridge Brothers v. De Witt*, 51 Neb. 98, the signature of the agent of defendant was procured to a bill of conditional sale, which was to operate as a chattel mortgage on a musical instrument purchased, and which provided for the payment of 10 per cent. interest per annum on deferred payments; this after the contract for the purchase had been fully made, and when plaintiff's agent was



leaving the store after having made the purchase. In this case the agent, presumably, could read and write, and signed the paper with the last name, only, either of herself or her principal, who was her son, on the representation of the member of the firm that it was nothing but a formal matter to complete the sale. Here, the defendant was relieved because of the artifice and deceit practiced in procuring the signature, which claim was corroborated by the manner in which the name was signed.

In the very recent case of *New Omaha Thompson-Houston Electric Light Co. v. Rombold*, 68 Neb. 54, the plaintiff was permitted to be relieved from his signature to a release similar in substance to that pleaded in the suit at bar, by a clear preponderance of the evidence that the receipt had been misread to him when his signature was obtained. While the judgment first rendered in this case was reversed on a rehearing on January 6, 1904, this portion of the opinion was not reversed, and is still of judicial weight in the determination of this question. But in this case, the agent of defendant purported to read the written instrument to the plaintiff, and procured his signature by deception in misreading the contents of the paper signed.

As before stated, we think our court has gone to the extreme length in the cases commented upon, in relieving from contracts and settlements signed without reading, or having the same read, before affixing the signature; and, still, all these cases depend on facts, both alleged and proved, that tend to show imposition and deceit resorted to for the purpose of procuring the signature.

Now, in the case at bar, we do not think the facts alleged in the reply, or amended reply tendered, stated facts which showed such artifice and fraud to have been practiced upon the plaintiff as would excuse him from either reading the release which he signed, or asking to have it read to him, before signing it.

It appears from the record that the injury to plaintiff was received on November 9, 1894; that the settlement was made and the \$200 paid to plaintiff on the first day of

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March, 1895. It also appears from the allegations in the reply that plaintiff was employed by defendant part of the time during the years 1895 and 1896 following the settlement; and, yet, this suit was not instituted, nor was any claim made against the company by defendant, until November 5, 1898, or four days before the statute of limitations would have barred the claim. Such apparent laches on plaintiff's part in asserting his claim may, with much propriety, have influenced the trial judge in sustaining the motion for judgment on the pleadings.

In *Wallace v. Chicago, St. P., M. & O. R. Co.*, 67 Ia. 547, it is held that a party who, having the capacity and opportunity to read a release of claims for damages for personal injuries signed by himself, and not being prevented by fraud practiced on him from so reading it, failed to do so, and relied upon what the other party said about it, is estopped by his own negligence from claiming that the release is not legal and binding upon him according to its terms. Of like effect is the holding in *Mateer v. Missouri P. R. Co.*, 105 Mo. 320; *Lumley v. Wabash R. Co.*, 71 Fed. 21.

It is therefore recommended that the judgment of the district court be affirmed.

HASTINGS and AMES, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, it is ordered that the judgment of the district court be

9874423 AFFIRMED.

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ROBERT S. TRUMBULL V. VIOLA TRUMBULL

FILED FEBRUARY 17, 1904. No. 13,384.

1. *Guardian and Ward.* There is a well defined distinction between the privileges accorded to parents and guardians in their communications with children and wards, with reference to their domestic relations, and that which exists between strangers.

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2. **Advice by Guardian.** Where advice is given by a guardian, which leads to a separation by the ward from husband or wife, the presumption is that the advice was given in good faith; but, where such advice is given by a stranger, the presumption is otherwise.
3. **Alienation of Affections: ACTION: DEFENSE.** In a suit for damages for alienation of affections, it is a good defense, on the part of a guardian, that he advised the ward from honest motives in a sincere belief that the advice given was for the moral and social good of the ward.
4. **Instructions.** Instructions examined, and *held* prejudicial.
5. **Error.** Paragraphs of a petition, which have been struck out on motion, should not be submitted to the inspection of a jury.

ERROR to the district court for Kearney county: ED L. ADAMS, JUDGE. *Reversed.*

*Thomas Darnell, L. C. Paulson and George E. Hager,*  
for plaintiff in error.

*J. C. Stevens and M. D. King, contra.*

OLDHAM, C.

This is an action for damages brought by the plaintiff in the court below against the defendant, her brother-in-law, for alienating the affections of her husband. The material facts underlying the controversy appear to be that plaintiff's husband, Oscar Trumbull, was a minor between 19 and 20 years of age at the time of his marriage. That, before the marriage, plaintiff and her husband each resided in the village of Minden, Nebraska. Plaintiff was of the age of 26 years, and had been engaged in the millinery business for several years in the village of Minden. Her husband was working for the defendant, Robert S. Trumbull, his brother and guardian, in Minden, when he became acquainted with plaintiff. In October, 1901, plaintiff removed to the city of Hastings, Nebraska, and was employed as a saleslady in a dry-goods store at that place. Shortly after her removal to Hastings, Oscar Trumbull went there, and married plaintiff at that place on the 14th

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day of October, 1901. The marriage license was procured without the consent of the guardian of Oscar Trumbull, on his statement in his application for a license that he was 23 years of age. After the marriage, plaintiff and her husband began housekeeping, and lived together as husband and wife, at Hastings, until the month of April, 1902, when the husband abandoned plaintiff, volunteered in the army of the United States, and has since refused to live with plaintiff. In the months of December, 1901, and January, 1902, the defendant, Robert S. Trumbull, wrote letters to his brother, at Hastings, urging him to abandon plaintiff and, according to plaintiff's testimony, persisted in writing similar letters, until he finally persuaded his brother to abandon plaintiff. Defendant, by way of answer to plaintiff's petition, alleges that he was the guardian and brother of plaintiff's husband, and admits that he wrote letters to his brother in the months of December, 1901, and January, 1902, urging him to abandon plaintiff, but alleges, in defense of his conduct, that at the time he wrote these letters he had no knowledge of the marriage of his brother to plaintiff, but believed he was living with her in a state of fornication; that he had reason to believe, and did believe, that plaintiff was an unchaste woman, and that she had been criminally intimate with his brother during her residence in Minden, and that he acted in good faith in advising his brother to abandon plaintiff. That, when he finally learned of the marriage of his brother to the plaintiff, he did not seek to persuade or induce his brother to abandon his wife. Defendant introduced testimony tending to support the theory of his answer, while the testimony of the plaintiff tended to show that defendant knew of the marriage before any of the communications were written to his brother. At the trial in the court below, the jury returned a verdict for plaintiff for \$1,000 damages. There was a judgment on the verdict, and defendant brings error to this court.

Numerous allegations of error are charged in the proceedings of the lower court, in the briefs of plaintiff in

error, only one of which it will be necessary for us to examine, in view of the conclusion we shall presently reach. The instructions given by the court appear to have all proceeded upon the theory that defendant, as guardian and brother of plaintiff's husband, had no right to advise and counsel with his brother and ward concerning his marriage, if he knew he was married, or even if he did not know such fact. Evidently regarding this as the law governing the case, the learned trial judge, in paragraph 9 of the instructions given on his own motion, told the jury:

"If you find the plaintiff was married to the defendant's brother, as alleged, and you further find that the defendant had no knowledge of the fact that they were married, then, if the plaintiff had been unchaste, and the defendant, believing the same, did that or anything which caused his brother to abandon the plaintiff and alienate his affections from her, such fact—that she had been unchaste, and not a fit woman to become a member of defendant's family—would not be a defense to plaintiff's cause of action; but the fact that she was of such character, and the defendant did not know that they were married, should be taken into consideration by you in determining the amount of damages, if any, plaintiff has sustained."

In view of this instruction, and paragraphs 6 and 8 of the instructions immediately preceding it, the court practically directed the jury to find a verdict for plaintiff, and to only consider the evidence relied upon by defendant in mitigation of damages.

The court evidently regarded the defendant as a mere stranger interfering with the marital relations existing between plaintiff and her husband, and applied to him the most rigid rules ever enforced against intermeddlers in household affairs. In this we think the court erred. The relationship existing between parent and child, and guardian and ward, is of such a character as to warrant the parent or guardian to consult and advise the child or ward, in good faith and with proper motives, even in re-

spect to their marital relations, and no cause of action will lie against the parent or guardian for such advice, unless recklessly and maliciously given.

There is a well defined distinction, recognized by the authorities, between the privileges of parents and guardians in their communications with children and wards, with reference to their domestic relations, and that which exists between strangers, particularly those of the opposite sex, in advising in these matters. Where advice is given by a parent or guardian, which leads to a separation by the child or ward from husband or wife, the presumption is that the advice was given in good faith; but, where such advice is given by a stranger, the presumption is otherwise; and, when an action for alienation of affections is brought against a parent or guardian, the gist of the action is the good faith in which the advice is given. Consequently, it is a good defense on the part of the parent or guardian to an action of this nature that they advise the child or ward from honest motives, in a sincere belief that the advice given was for the moral and social good of the child or ward. *Reed v. Reed*, 6 Ind. App. 316; *Hutcheson v. Peck*, 5 Johns. (N. Y.) \*196; *Bennett v. Smith*, 21 Barb. (N. Y.) 439; *Glass v. Bennett*, 89 Tenn. 478.

As this case must be reversed for errors in instructions given, we think it might be well to suggest that an amended petition be filed by plaintiff on a new trial, in which the allegations of the original petition that were struck out on motion of the defendant at the former trial are eliminated. This suggestion is made in view of the fact that complaint is made by defendant that the petition, with all the original allegations, was sent to the jury, while deliberating, with the paragraphs that were excluded simply marked "out" on the margin. Paragraphs of petitions which have been stricken out on motion should not, under any circumstances, be submitted to the inspection of the jury.

We therefore recommend that the judgment of the dis-

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trict court be reversed and the cause remanded for further proceedings.

AMES and HASTINGS, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, it is ordered that the judgment of the district court be reversed and a new trial granted.

REVERSED.

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HERMAN BODEN ET AL., APPELLANTS, V. RENA MIER ET AL.,  
APPELLEES.

FILED FEBRUARY 17, 1904. No. 13,288.

1. **Nonresidents: SERVICE OF PROCESS.** Section 22, chapter 20, Compiled Statutes, provides: "All writs, notices, orders, citations and other process, \* \* \* may be served in like manner as a summons in a civil action in the district court," and that "in cases where writs, notices, citations or other process can not be served as aforesaid in this state, the probate court may, in cases where it may be necessary, order the service thereof to be made by publication in some newspaper in this state in such manner as the court may direct." *Held*, That this section does not authorize the county court to order personal service on a nonresident minor, in proceedings had to vacate a judgment or order of such court in probate proceedings, no affidavit that service can not be made in this state being on file.
2. **Constructive Service: AFFIDAVIT.** Personal service, outside the state, in pursuance of section 81 of the code, is a nullity in the absence of an affidavit for service by publication.
3. **Jurisdiction.** Where jurisdiction has not been obtained by due service of process, a court acquires no jurisdiction over minor defendants by the appointment of a guardian *ad litem*, and the filing of an answer by such guardian.
4. **Advancements: PROOF.** Section 34, chapter 23, Compiled Statutes, provides: "All gifts and grants shall be deemed to have been made in advancement, if they are expressed in the gift or grant to be so made, or if charged in writing by the intestate as an advancement, or acknowledged in writing as such by the child or other descendant." In an action to adjust advancements, *held*, that oral testimony is incompetent to prove the advancements.

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5. **Estate: Distribution.** In the distribution or partition of an estate, a debt due the estate from a distributee, or some person through whom he inherits by right of representation, which is barred by the statute of limitations, can not be deducted from the share of such distributee.
6. **Guardian ad Litem: Duties.** The appointment of a guardian *ad litem* is not a mere matter of form, nor are his duties merely perfunctory; he should prepare and conduct the defense of his wards with the same care and skill as though acting under a retainer.

APPEAL from the district court for Saline county:  
GEORGE W. STUBBS, JUDGE. *Affirmed.*

*F. I. Foss and R. D. Brown, for appellants.*

*A. S. Sands and J. H. Grimm, contra.*

ALBERT, C.

In March, 1900, Henry A. Boden died intestate leaving three children who are the appellants, and three grandchildren the issue of Albert H. Boden, a son who had died about a year before, who are the appellees, as his sole and only heirs at law. The grandchildren are under the age of 14 years.

Herman Boden, a son of the intestate, was appointed administrator of the estate, which appears to have been fully settled and closed up in the county court of Saline county sometime previous to the 19th day of April, 1901.

On the date last mentioned, the administrator filed a petition in that court alleging that, on the 1st day of January, 1889, the intestate had advanced the sum of \$250 to his son Albert, in anticipation of his share in the estate of the intestate, and as evidence thereof the latter had executed his note to the intestate on said date for that amount, payable with interest one year after date; that on the 7th day of December, 1894, the intestate, in discharge of a certain debt of his son Albert to a third party, had executed his two notes to such third party, each for the sum of \$1,570, payable respectively January 1, 1897, and Janu-



ary 1, 1898, after date; that none of said notes were paid during the lifetime of the deceased, but that the administrator, on the — day of June, 1890, had paid the sum of \$3,006.48, the amount then due on the last two notes, in discharge thereof; that by reason of his inexperience and lack of counsel he had made such payment, although said notes had never been allowed as claims against the estate of the intestate, and for the same reason neither they, nor the note for \$250 given as evidence of the advancement hereinbefore mentioned, had been reported or taken into account in the final settlement of the estate. It was also alleged that the widow of Albert H. Boden and his said children resided in the state of Colorado. The relief sought was that the estate be "opened up"; that he be credited with the amount paid by him in discharge of the two notes executed by the intestate to a third party, as aforesaid; and that the amount of the three notes be charged against the share of the estate going to the children of Albert H. Boden, as an advancement made to him by the intestate.

The county court set a time for hearing the petition, and issued process for service on the children of Albert H. Boden, and at the same time, in writing on the writ "specially deputed" Mr. B. V. Kohout to serve the same on said children and their guardian in the state of Colorado or elsewhere without this state. Mr. Kohout made service of the writ in Colorado and made return under oath.

The county court appointed a guardian *ad litem* for said children who answered on their behalf. Upon what appears to have been an *ex parte* hearing, the court granted the prayer of the petition, allowing the administrator the credit prayed, and charging the share of the children of Albert H. Boden with \$4,372.18, the amount of the three notes, as an advancement made to their father in his lifetime.

Afterward Herman Boden, the administrator, in his own behalf, brought an action in the district court against all the other heirs of his father for the partition of certain

lands which were a part of the estate. In his petition he asked that the amount charged by the county court against the share of the children of Albert H. Boden be made a charge against their interest in the lands sought to be partitioned. These children were represented by guardians *ad litem*, who denied the jurisdiction of the county court to adjust the alleged advancements, and denied that the amount thus charged, or any portion thereof, was chargeable as an advancement against the share of the estate going to such children. The district court decreed a partition of the land, but refused to charge the alleged advancements against the share of the children. The other heirs appeal.

But two questions are presented by the appeal: (1) Had the county court jurisdiction in the proceedings had, to open the estate and adjust the alleged advancements? (2) If not, then should the district court have adjusted and allowed the advancements in the partition suit?

The record of the proceedings had in the county court previous to the filing of the petition to open up the estate and adjust the advancements is not before us. But the allegations and the prayer of the petition, as well as the proceedings had thereon, presuppose the existence of a decree of distribution and a final settlement of the estate; and the present case was tried in the district court, and argued in this court, on the theory that, after the petition for opening up the estate and for the adjustment of the advancements had been filed, service of process, or what would be equivalent thereto, was necessary to vest the county court with jurisdiction in the premises.

The appellants first contend that the county court acquired such jurisdiction by the service made on the appellees by Mr. Kohout, and insist that this contention is supported and established by section 22, chapter 20, Compiled Statutes (Annotated Statutes, 4806), which is as follows:

"All writs, notices, orders, citations, and other process, except in proceedings for contempt, may be served in like

manner as a summons in a civil action in the district court, and the service of the same by a copy thereof, left at the usual place of residence of the party to be served, shall be deemed equivalent to personal service thereof in cases where personal service is required by law; but to bring a party into contempt there must have been actual personal service of the process upon the disobedience of which the contempt is founded, and there must be actual personal service of all process in the proceedings for contempt. In cases where writs, notices, citations, or other process can not be served as aforesaid in this state, the probate court may, in cases where it may be necessary, order the service thereof to be made by publication in some newspaper in this state in such manner as the court may direct, and thereupon the same proceedings may be had as if such writs or other process had been served as aforesaid in this state. Nothing contained in this section shall limit or take away the power of the probate court or judge thereof to give notice or cause the same to be given by publication in the various cases provided by law."

The construction which the appellants would place on that section is shown by the following taken from their brief:

"It will be seen from the foregoing that the method of the service of writs, notices, etc., outside of the state is left entirely to the discretion of the county judge. He may have the notice served by publication when in his judgment 'it may be necessary,' but he is not required to employ this method."

We do not think the section will bear that construction. It contemplates two classes of cases: Those where service in the manner prescribed may be had in this state, and those where it can not. It not only provides how service "may" be made in the latter class of cases, but also how it "may" be made in the former. If, as the appellants claim, the provisions as to service in the latter should be held directory or permissive because of the auxiliary "may," then the provisions as to service in the former

should also be held directory or permissive for the same reason. In other words, that the entire section is merely directory, and in any probate matter the manner of service of process, original or otherwise, "is left entirely to the discretion of the county judge." That it was not the intention of the legislature to leave the manner of service of process in any such state of uncertainty seems too clear to admit of argument. The section should be read and understood, we think, precisely as though the legislature had used the term shall instead of may, and should be held to be no less mandatory. The section, thus construed, does not authorize service to be made outside the state in any other manner than by publication in some newspaper within the state. It is unnecessary to determine whether service might have been made in this case in pursuance of section 81 of the code, which provides for personal service without the state in cases where service may be had by publication, because it is admitted that no affidavit for service by publication was filed. Valid service in pursuance of such section can only be made after filing such affidavit. *Atkins v. Atkins*, 9 Neb. 191; *McGaroc v. Pollock*, 13 Neb. 535; *Rowe v. Griffiths*, 57 Neb. 488; *Albers v. Kozeluh*, 68 Neb. 522. Personal service outside the state, at best, is only a form of constructive service. *Anheuser-Busch Brewing Ass'n v. Peterson*, 41 Neb. 897. That the requirements of a statute authorizing constructive service must be complied with in every material respect is elementary. *Works, Courts and their Jurisdiction*, p. 266, sec. 38; *Alderson, Judicial Writs and Process*, p. 313, sec. 142. That the service made by Mr. Kohout was not a substantial compliance with the provisions of the statute requiring service by publication in some newspaper is obvious, and was therefore ineffective. In *Hughes v. Housel*, 33 Neb. 703, the court say: "When the record of a cause, in which a judgment is rendered against a minor, discloses that the mode pointed out by the statute for obtaining jurisdiction had not been followed, the judgment is void on its face." In this case the

mode pointed out by the statute was wholly disregarded, and one not recognized adopted. It is not therefore a case of defective service, but of no service, and the proceedings predicated thereon are not voidable, but absolutely void, so far as affects the rights of the children of Albert H. Boden.

It is next contended that the county court acquired jurisdiction by the appointment of a guardian *ad litem* for the appellees, and the filing of an answer by him in their behalf. There are authorities which support this contention, but we think the better considered cases are against it. *New York Life Ins. Co. v. Bangs*, 103 U. S. 435; *Roy v. Rowe*, 90 Ind. 54; *Chambers v. Jones*, 72 Ill. 275; *Good v. Norley*, 28 Ia. 188; *Frazier & Tulloss v. Pankey*, 1 Swan (Tenn.), 75.

The appellants next insist that, even were the county court without jurisdiction to adjust the alleged advancements, it was within the jurisdiction of the district court to adjust them in the partition suit. There is no doubt that the district court, in a proper case, may adjust advancements in a suit for the partition of land. *Schick v. Whitcomb*, 68 Neb. 784.

But, while the three notes are frequently referred to in the argument as advancements, there is no competent evidence in the record that they or any of them were in fact such. In order that a gift or grant shall be deemed an advancement, it must be expressed in the gift or grant to be so made, charged in writing by the intestate as an advancement, or acknowledged in writing as such by the child or other descendant. Section 34, chapter 23, Compiled Statutes (Annotated Statutes, 4934). That section by implication excludes parol evidence of an advancement. *Pomeroy v. Pomeroy*, 93 Wis. 262; *Bulkeley v. Noble*, 2 Pick. (Mass.) 337; *Bullard v. Bullard*, 5 Pick. (Mass.) 527; *Barton v. Rice*, 22 Pick. (Mass.) 508. The evidence relied upon in this case as showing that the notes, or any of them, were intended as advancements is exclusively parol, and, as we have seen, wholly incompetent for that purpose.

The alleged advancements then were, at best, no more than mere debts due the estate from the estate of the deceased father of the appellees. There is no doubt that in a proper case debts due the estate from the distributee, or the party from whom he claims by right of representation, may be deducted from his share of the estate. *Bowen v. Evans*, 70 Ia. 368; *Blackler v. Boott*, 114 Mass. 24; *Earnest v. Earnest*, 5 Rawle (Pa.), 213; *Girard Life Ins Co. v. Wilson*, 57 Pa. St. 182; *Snyder v. Warbasse*, 11 N. J. Eq. 463. The English courts hold that this rule applies even to debts barred by the statute of limitations, and that view has been adopted by the courts of some of our own states. But we think the better doctrine is that it does not apply to such debts. As was said in *Holt v. Libby*, 80 Me. 329:

"In many instances such claims are covered by the dust of time and forgotten, though found by executors after the death of testators. In many other instances the advances are intended as benefactions and gifts, conditioned on some unforeseen circumstance arising to make it expedient to regard them as debts." See, also, *Wadleigh v. Jordan*. 74 Me. 483; *Allen v. Edwards*, 136 Mass. 138; *Reed v. Marshall*, 90 Pa. St. 345; *Milne's Appeal*, 99 Pa. St. 483.

The note of \$250 was due January 1, 1890, and was barred long before the death of either the payee or payor. The other two notes, as we have seen, are alleged to have been given on the 7th day of December, 1894, by the intestate in discharge of a certain debt, which his son Albert, father of the appellees, owed to a third party. The evidence as to that transaction is exclusively parol, and is to the effect it was agreed between the father and son that, in case the latter failed to repay the amount during the lifetime of the intestate, it should be deducted from his share of the estate. This evidence shows that immediately upon the giving of such notes, the father of the appellees became indebted to the intestate in the amount of the debt thus discharged, and the right of action accrued thereon that instant. The stipulation that such indebtedness should be deducted from the debtor's share of the intes-

tate's estate would not prevent the running of the statute, nor change the debt into an advancement. It is clear, therefore, that the entire indebtedness sought to be charged against the appellees was barred by the statute of limitations, and the court properly refused to enforce it against their share of the estate.

What has been said disposes of this appeal; but it may not be out of place to call attention to a matter not necessary to a decision. On the trial the gentleman who had been appointed guardian *ad litem* in the county court testified that the hearing on the petition to open up the estate and charge the advancements was set for one o'clock of a certain date; that he appeared in the county court at 1:30 o'clock of such date, and was informed by the county judge that the hearing on the petition had been closed; he then called the attention of the county judge to the answer which he had previously filed on behalf of the minors, and informed him that he did not think the petitioners were entitled to the relief asked; whereupon the county judge remarked that he examined into the matter, and was satisfied that the relief prayed should be granted. The foregoing shows to what extent the minors were represented in the county court. It also shows, we think, not only unseemly haste on the part of the county judge in the disposition of an important matter, but that both he and the learned gentleman who acted as guardian *ad litem* fell into a common error, namely, that the appointment of a guardian *ad litem* is a mere matter of form, and his duties purely perfunctory. Such is by no means the case. He should prepare and conduct the defense of his wards with as much care as though acting under a retainer. Any lower standard finds no justification either in law or the ethics of the profession.

It is recommended that the decree of the district court be affirmed.

BARNES and GLANVILLE, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the decree of the district court is

**AFFIRMED.**

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**EDWARD BROWN ET AL. V. N. S. BROWN ET AL.**

FILED FEBRUARY 17, 1904. No. 13,316.

1. **Wills: CHILD OMITTED: EVIDENCE: BURDEN OF PROOF.** Section 149, chapter 23, Compiled Statutes, provides: "When any testator shall omit to provide in his will for any of his children, or for the issue of any deceased child, and it shall appear that such omission was not intentional, but was made by mistake or accident, such child or the issue of such child shall have the same share in the estate of the testator as if he had died intestate, to be assigned as provided in the preceding section." *Held* (1) That parol evidence is admissible to show whether such omission was intentional; (2) That the burden of proof is on the pretermitted child or grandchild to show that the omission was unintentional.
2. **Trial: NEW PARTIES.** Section 50a of the code, which provides for intervention before trial, does not curtail the power of a court to bring other parties before it, when satisfied that their presence is necessary to a proper determination of the cause.
3. **Harmless Error:** An erroneous ruling overruling a demurrer is error without prejudice, where the pleading assailed is afterwards amended, and the cause submitted and determined on the amended pleading.
4. **Trial: AMENDMENT.** When necessary to a proper determination of the cause, it is not error to permit an amendment to a pleading after trial, and reopen the case for a trial of the issues tendered by such amendment.
5. **Findings: EVIDENCE.** Evidence examined, and *held* insufficient to sustain the findings of the trial court.

ERROR to the district court for Hamilton county:  
SAMUEL H. SORNBORGER, JUDGE. *Reversed.*

*Hainer & Smith*, for plaintiffs in error.

*J. H. Edmondson, M. F. Stanley and O. A. Abbott,*  
*contra.*



**ALBERT, C.**

On the 18th day of February, 1901, an instrument purporting to be the last will and testament of Henry S. Brown, deceased, was admitted to probate in the county court of Hamilton county. The testator was the father of 13 children, ten of whom survived him. Three of his sons, George A., Hamilton J. and Albert H., died before the execution of the will. The first left four children, namely, Carrie, Nellie, Ethel and George; the second left three, Jennie, Ettie and Charles; the third left two, George and Mabel. The will, after making provision for the payment of the debts of the testator and for the support of the surviving widow, contains the following provisions:

"I give and bequeath one hundred dollars (\$100) each to the following, my grandchildren, to wit, Carrie Brown, Nellie Brown, Ethel Brown and George Brown, and being children of my deceased son, George W. Brown; and to Jennie Brown and Ettie Brown, being children of my deceased son, Hamilton J. Brown; and being in the aggregate to my said six grandchildren the sum of six hundred dollars (\$600). \* \* \* After the payment of all my just debts, and the payment of said legacies to my said wife and grandchildren, and the setting off to my said wife of said real estate hereinbefore specifically mentioned, I give, bequeath and devise all the rest, residue and remainder of my estate, both real and personal, of whatsoever it may consist and wheresoever situated, to such of the children of my own body begotten as shall survive me. Such surviving children to share the said residue of my estate share and share alike."

After the final report of the administrator with the will annexed had been filed, and before a hearing thereon, George and Mabel Brown, children of the deceased son, Albert H. Brown, by their next friend, filed a petition in the county court alleging, among other things, that "neither they nor their deceased father were mentioned

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by name in said will," but, "that they were included in the general designation of 'children of my own body begotten.'" The prayer is as follows:

"Wherefore your petitioners pray that the court construe and declare the true meaning and intent of said testator, and that your petitioners may be adjudged and decreed to be included under the words 'children of my own body begotten' and entitled to an undivided one-eleventh (1-11) part of the estate of said Henry S. Brown, deceased, as residuary devisees, subject to the other provisions in said will contained, and, in the event the court should determine that your petitioners were not included, or intended to be included, under the words, 'children of my own body begotten,' that they may be adjudged and decreed to be entitled to an undivided one-thirteenth (1-13) part of the entire estate of the said Henry S. Brown, deceased, subject only to the dower and homestead rights of the widow of the testator, Angelina Brown."

The court found against the petitioners, and dismissed their petition; an appeal was taken to the district court. In the meantime, on the 8th day of January, 1902, five children of the testator commenced a suit in the district court against the other five for a partition of the real estate of which the testator died seized, which proceeded to a final decree confirming the respective shares of the parties to that suit to such real estate. There were other parties to the suit, but it is unnecessary to mention them. A sale had been ordered, and notice thereof published. On March 22, 1902, and about two hours before the time fixed for the partition sale, George and Mabel Brown, children of the deceased son, Albert H. Brown, and petitioners in the proceeding brought in the county court for a construction of the will, filed a petition of intervention in the partition suit, which, save in some minor details not necessary to notice at this time, was substantially the same as that filed by them in the proceeding for a construction of the will. The plaintiffs and defendants

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in the partition suit joined in a motion to strike the petition of intervention from the files, for the reason that the application for intervention was too late, which motion was overruled. The plaintiffs and defendants then joined in a demurrer to the petition of intervention, which was also overruled. The plaintiffs and defendants then filed an answer to the petition of intervention, in which, after making a general denial, they set out the proceedings had for the probate of the will, insisting that, as no proceedings had been had or instituted to reverse, vacate or modify the decree admitting the will to probate, the questions raised by the petition of intervention were *res judicata*. The interveners filed a reply which amounts to a general denial. In the meantime the referees had made a sale of the lands, and on the 8th day of May, 1902, on the motion of all the parties, including the interveners, the sale was confirmed, and the referees were ordered to distribute the proceeds, except the sum of \$2,000, which they were directed to hold to await the final decision of the court on the matters in litigation between the interveners and the other parties to the suit. Afterwards four of the plaintiffs, children of the testator, in open court withdrew all opposition to a decree in favor of the interveners, and asked the court to direct the payment to the interveners, out of the amount retained in the hands of the referees, of such portion thereof as should be deducted proportionately from the shares of the plaintiffs joining in such request, and the court entered an order in accordance with their request. Afterwards the appeal from the county court in the proceeding to construe the will and the suit between the interveners and the other parties to the partition suit having been consolidated, the issues in both were tried on the same evidence. The court held against the interveners on their contention as to the construction of the will, but held further that they had been unintentionally omitted from the will by accident or mistake, and were therefore entitled to a share of the estate by virtue of the provisions of section 149, chapter

23, Compiled Statutes (Annotated Statutes, 5014), relating to the omission of children or the issue of any deceased child from a will. Thereupon the interveners, over the objections of their opponents, were given leave to amend their petition of intervention in such a way as to make the allegation, "neither they nor their deceased father were mentioned by name in said will," read, "neither they nor their deceased father were mentioned by name in said will, but these petitioners were omitted therefrom by mistake or accident, unless they were included in the general designation of 'children of my own body begotten.'" It is unnecessary to go into details as to what followed the amendment. Eventually the parties were permitted to introduce evidence on the issues tendered by such amendment, and the court found in favor of the interveners, and entered a decree directing that the proportionate share should be paid from the proceeds of the sale retained by the referees. The defendants bring the record here for review on error.

An examination of section 149, *supra*, will dispose of some of the questions raised in this case; it is as follows:

"When any testator shall omit to provide in his will for any of his children, or for the issue of any deceased child, and it shall appear that such omission was not intentional, but was made by mistake or accident, such child or the issue of such child shall have the same share in the estate of the testator as if he had died intestate, to be assigned as provided in the preceding section."

One question arising under this section is, whether parol evidence is admissible to show whether the omission was intentional? The decisions of other courts, based on statutes of a similar character, are in conflict. *Wilson v. Fosket*, 6 Met. (Mass.) 400, is a leading case in the affirmative. This case is reported and annotated in 39 Am. Dec. 736. To the same effect are the following: *Lorieux v. Keller*, 5 Ia. 196; *Stebbins v. Stebbins*, 94 Mich. 304, 54 N. W. 159; *Moon v. Estate of Evans*, 69 Wis. 667, 35 N. W. 20. In the last case, the doctrine appears to

have been applied without question. Such evidence is held inadmissible in the following cases: *Estate of Garraud*, 35 Cal. 336; *In re Estate of Sterens*, 83 Cal. 322, 17 Am. St. Rep. 252; *Bradley v. Bradley*, 24 Mo. 311; *Pounds v. Dale*, 48 Mo. 270; *Chace v. Chace*, 6 R. I. 407. It is not easy to reconcile the doctrine of either line of authorities with the rule which requires the courts to give effect to the intentions of the testator because, in either case, a finding that the omission of a child or grandchild from the will was unintentional, is equivalent to a finding that the will does not reflect the intentions of the testator. When such fact is once established, what his intentions actually were becomes a matter of conjecture, because, had he made provision in the will for the pretermitted child, such provision of necessity would have resulted in a modification of the provisions made for the objects of his bounty. Just how he would have modified the other bequests or devises to make provision for such child can rarely, if ever, be ascertained with certainty. However that may be, we are disposed to follow the cases holding that parol evidence is admissible to show whether the omission was intentional. In addition to the reasons given in cases supporting that doctrine, we find an additional reason in the language of our section 149, and the section immediately preceding it. Section 148 provides:

"When any child shall be born after the making of his parent's will, and no provision shall be made therein for him, such child shall have the same share in the estate of the testator as if he had died intestate, \* \* \* *unless it shall be apparent from the will that it was the intention of the testator that no provision should be made for such child.*"

The foregoing provision shows that the lawmakers worded the section under consideration advisedly, and with a view to express their meaning fully and clearly. If they saw the importance of limiting the evidence of the intentions of the testator in regard to posthumous children to the will itself, it is not at all likely that in the next section they would have left it a matter of specula-

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tion, whether such proof should be limited to the instrument itself, or might be supplied by parol. We are satisfied that whether the omission was intentional or unintentional is a question of fact, which may be established by parol testimony.

Another question which has arisen under statutes similar to ours is, whether the burden of proof is upon the pretermitted child or grandchild to show that he was unintentionally omitted from the will, or whether it is upon those claiming that his omission was intentional. The Massachusetts statute, for present purposes, may be said to be substantially the same as our section 149, save that, instead of the clause, "and it shall appear that such omission was not intentional, but was made by mistake or accident," the Massachusetts statute reads, "unless it shall appear that such omission was intentional and not occasioned by mistake or accident." In *Ramsdill v. Wentworth*, 106 Mass. 320, it was held that the clear inference from the use of the words, "unless it appears," etc., is that the burden of proof is on those claiming that the omission of the child from the will was intentional. The difference between the Massachusetts statute and our own is important on the question of the burden of proof. There, the child or grandchild omitted from the will receives a distributive share, *unless it appear that the omission was intentional, and not occasioned by mistake or accident*; here, he receives such share, *if it appear that his omission from the will was not intentional, but was made by mistake or accident*. It seems to us that, under our statute, the inference that the burden of proof is on the pretermitted child is as clear from the words, "and it shall appear that such omission was not intentional, but was made by mistake or accident," as that drawn by the court in *Ramsdill v. Wentworth*, *supra*, from the words, "unless it appears," etc. Under section 149, a child omitted from the will must show two things: First, that he was omitted therefrom; second, that such omission was not intentional. It is only when he has shown both of those facts that he

is entitled to a share of the estate. The omission to provide for the child in the will, though unintentional, furnishes no ground for objecting to the probate of the will, but the remedy is after probate and by construction. *Doane v. Lake*, 32 Me. 268; *Schneider v. Koester*, 54 Mo. 500; *Pearson v. Pearson*, 46 Cal. 609. Hence, to hold that the burden of proof is on the parties claiming the omission was intentional, would be to hold, in effect, that, after the will has been admitted to probate as the solemn declaration of the testator's intentions as to the disposition of his property and those whom he had selected as proper objects of his bounty, it fails, *prima facie*, to express such intentions. It may be said that it is to be presumed that a testator would not intentionally fail to provide for a child or grandchild. If there is the slightest presumption of that kind, it is far weaker than the presumption that one, competent to make a will and to understand its contents, would forget or overlook one of his children or grandchildren. To fail to make provision for a child or grandchild in a will is a common occurrence; to forget or overlook them, under ordinary circumstances, is rare. In our opinion, the burden of proof was upon the interveners to show that their omission from the will was unintentional, and the result of accident or mistake. In reaching this conclusion, we have not overlooked *Stebbins v. Stebbins*, *supra*. The decision in that case is based on a statute worded like our own. The majority opinion merely holds that the evidence was sufficient to warrant the submission of the question whether the omission was intentional to the jury, and does not discuss the question of the burden of proof. In an able dissenting opinion, by Montgomery, J., concurred in by McGrath, C. J., that question is discussed at length, and the conclusion reached that the burden was on the party claiming that the omission was unintentional. On the facts stated, the majority opinion is not necessarily in conflict with the conclusion reached by the minority on that question. Hence, the dissenting opinion may be regarded as authority for the con-

struction we have placed on the section under consideration, and, so far as our research has extended, is the only attempt at a judicial interpretation of the language of that section.

Some of the questions presented by the record require more specific attention, and we shall now proceed to consider them. It is contended that the court erred in permitting intervention after a decree for a partition of the lands had been entered. This contention is based on section 50a of the code, which provides that "any person who has or claims an interest in the matter in litigation, \* \* \* may become a party to an action between any other persons, \* \* \* either before or after issue has been joined in the action, and before the trial commences." But, however that section may affect the right of a party to intervene, we are satisfied that it was not intended, and should not be permitted, to require a court to pursue an erroneous theory to a worthless decree, nor to curtail in any degree its power to do complete justice, so long as it retains jurisdiction of the cause and the parties. See section 46 of the code. The present case will illustrate our meaning. It is a suit in equity in which the children of the testator claim title in fee to the lands to the exclusion of all other persons. Proceeding on the theory that they were the exclusive owners in fee, the court entered a decree and directed a sale. It was then brought to the attention of the court that the interveners claimed an undivided interest in the estate. That such claim was brought to the attention of the court by their petition of intervention is wholly immaterial, so long as the court was satisfied that there might be some basis for the claim. Will it be claimed that the court was bound to disregard such claim, because it was not brought to its attention before decree, and to proceed to a sale of a doubtful title? To those who had actual knowledge of the interveners' claims, such claims, undetermined, would be more than likely to prevent a sale; a sale to one not having such notice would amount to a judicial fraud. The court still retained jurisdiction of



the cause and the parties, and it seems to us it was not only its right, but its duty, to hear and determine the claims of the interveners, although not presented until after decree. It is true the sale was made under the decree as it stood when the petition in intervention was filed, but that appears to have been with the consent of the interveners who joined in the motion to confirm, and who asked only a share of the proceeds. Although our attention has been called to no case directly in point, we are all of the opinion that, under the peculiar facts disclosed by the record, it was not error to permit the interveners to come into the case after decree.

It is argued, at some length, that the court erred in overruling the demurrer to the petition of intervention. As such petition stood when the demurrer was overruled, it was based on the theory that the interveners, who it will be remembered are grandchildren of the testator, were included within the term "children" in the residuary clause of the will. That theory, to our minds, is untenable. It is a familiar rule of construction that, ordinarily, words should be taken in the sense in which they are commonly used. It is a matter of common knowledge that, in ordinary conversation and the affairs of life, the word "child" is commonly used to designate a son or daughter, a male or female descendant of the first degree. Such is Webster's definition of the term, and such is its primary signification according to all standard lexicons. It is safe to say that, standing alone, it is never understood to mean grandchildren. Bouvier says: "The term children does not, ordinarily and properly speaking, include grandchildren or issue generally; yet sometimes that meaning is affixed to it in cases of necessity." *In re Estate of Chapoton*, 104 Mich. 11, 61 N. W. 892, the court, referring to the language of Bouvier said:

"We shall find this statement of Bouvier confirmed in many cases involving wills, although cases are not rare where the term 'children' has been held coextensive with 'issue' or 'descendants.' Such holdings are not put upon the

ground that the word 'children' has a technical or peculiar meaning in the law, but because such meaning is necessary to give effect to the instrument, or because of an evident intent upon the part of a testator. It is in deference to the rule that the intent is to be sought after and given effect in the construction of wills, which may be done to the extent of holding illegitimate children to be included in the term, 'children,' though the law ordinarily excludes them. See Bouvier, Dictionary, title Child, subdivision 3; *In re Curry's Estate*, 39 Cal. 529; 4 Kent, Commentaries, 345. In *Rceves v. Brymer*, 4 Ves. (Eng.) 692, cited by counsel, the court said that 'children' may mean 'grandchildren,' where there can be no other construction, but not otherwise. *Pride v. Fooks*, 3 De Gex & J. (Eng.) \*252."

It is obvious, from the portions of the will heretofore set out, that no strained or unusual meaning of the word "children" is required to give effect to the instrument, or to carry out the intention of the testator. It is clear, therefore, that the interveners were not included in the residuary clause of the will, and that their original petition of intervention, based on the theory that they were thus included, failed to state a cause of action. But as the court found against that theory, and it was afterwards abandoned by the amendment to the petition of intervention, the overruling of the demurrer was error without prejudice.

It is next contended that the court erred in permitting the amendment to the petition to the effect that the interveners had been omitted from the will by accident or mistake. The amendment was made after the case had been tried, and after the defendants had interposed proper and timely objections to the petition of intervention, and to the introduction of evidence which would tend to support the issue tendered by the amendment. It is clear, therefore, that the amendment was not warranted as an amendment to conform to the proof, because it is a familiar rule that an amendment of that character is permissible only

where the evidence tending to sustain the amendment has been received without objection. But, after the amendment was made, the case was opened, and the parties were permitted to introduce evidence, and were given a hearing on the issue tendered by the amendment. What has been heretofore said on the question of the right of the interveners to come into the case after decree is applicable here. If the evidence taken before the amendment was offered was of such a character as to satisfy the court that it would be unable to convey a clear title by a sale of the lands, without a further investigation of the claims of the interveners, it was eminently proper to permit the amendment, and give all of the parties an opportunity for further investigation and hearing. Such a course, it seems to us, was in the interest of all parties to the suit, and one of which none should be heard to complain, especially when the interest of minors is involved.

Another contention of the defendants is that the finding of the district court, that the omission of the interveners from the will was unintentional, is not sustained by sufficient evidence. The testator was 76 years old. The evidence, on the one hand, tends to show that his memory was greatly impaired; on the other, that it was unusually retentive for a man of his years. There is little evidence bearing directly on what his intentions were with respect to the interveners at the time the will was made. On the part of the interveners, it was shown that, after the will was made, the testator repeatedly stated that he had made provision therein for all his grandchildren; that he had given them \$100 each, except one who was an imbecile, to whom he stated he gave nothing because of his mental condition. That particular grandchild is not a party to this suit, and is not of the same parents as the interveners. On the part of the defendants, it was shown that, at the time the will was made, the attention of the testator was specifically called to the omission of the three grandchildren from the will, but, notwithstanding that fact, he executed it without any alteration, and showed by his words

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and conduct that he was fully aware of the omission, and that it was intentional; that, after the will was made, he talked over the contents with a witness in the suit, and, in such conversation, the omission was pointed out to him, and he was asked why he had not provided for the other grandchildren, and he gave his reasons for the omission. The evidence further shows that there was some trouble between the testator and the interveners or some member of their family, the exact nature of which is not clearly disclosed. There is also evidence tending to show that the failure of the testator to recognize acquaintances on the street was due, rather to his defective eyesight, than to any impairment of memory.

By the pleadings on file in this suit, both the interveners and the defendants are committed to the theory that the will was duly admitted to probate. The decree of the county court admitting the will to probate is conclusive on all parties as to its due execution, and all questions affecting the competency of the testator to make a will. 2 Black, Judgments (2d ed.), sec. 635. Hence, it stands as one of the established facts in this case that the testator, at the time the will was made, was not lacking in testamentary capacity. In other words, it is conclusively established by the probate of the will that, at the time it was made, the testator possessed sufficient mind to understand, without prompting, the business about which he was engaged, the kind and extent of the property to be willed, the persons who were the natural objects of his bounty, and the manner in which he desired the disposition to take effect, because that is all included in the findings on which the decree admitting the will to probate is based. Schouler, Wills (3d ed.), sec. 68. In view of the fact that the will had been admitted to probate, and the testamentary capacity of the testator thereby set at rest, we think the evidence is insufficient to sustain a finding that the omission of the interveners was unintentional. As stated in a former part of this opinion, the burden of proof was on the interveners. The testimony adduced by them

is not wholly inconsistent with the theory that the omission was intentional. On the other hand, the testimony adduced by the defendants, at least a portion of it, is of such a character that it must either be rejected, or the omission held to have been intentional. None of the witnesses are discredited; on the contrary, it would seem that each gave the facts as he understood them. Hence, there is no ground for rejecting the testimony showing affirmatively that the testator knew of the omission, and that it was intentional. An examination of the entire evidence satisfies us that the finding of the district court is erroneous.

It is recommended that the decree of the district court be reversed and the cause remanded for further proceedings according to law.

GLANVILLE, C., concurs. FAWCETT, C., not sitting.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is reversed and the cause remanded for further proceedings according to law.

REVERSED.

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JOHN P. SATTLEB, ADMINISTRATOR OF THE ESTATE OF  
EMANUEL LEVERONI, DECEASED, V. CHICAGO, ROCK  
ISLAND & PACIFIC RAILWAY COMPANY.

FILED FEBRUARY 17, 1904. No. 13,223.

1. **Common Carrier: ACTION: CONTRIBUTORY NEGLIGENCE.** A fast through train on defendant's road was sidetracked at a small way station to allow another through train to pass. Some fifteen minutes later, plaintiff's intestate left a car of the standing train, in which he was a passenger, and crossed diagonally the main track upon which the other train was approaching, at a time and in such direction that he could see the incoming train. He hurriedly went to a pump some 10 steps from where he crossed the main track, hurriedly procured a drink, and ran back toward his car, attempting to pass in front of the rapidly moving train

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*Sattler v. Chicago, R. I. & P.R. Co.*

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on the main track, and was struck by the engine and killed. *Held*, That deceased was guilty of such negligence as to preclude recovery.

2. **Directing Verdict.** When the evidence is not sufficient to warrant a verdict for plaintiff, the court should not submit the case to the jury upon the theory that it is so sufficient. A peremptory instruction for defendant in this case *held* warranted.
3. **Case Approved.** *Chicago, R. I. & P. R. Co. v. Sattler*, 64 Neb. 636, approved and followed.

ERROR to the district court for Cass county: PAUL JESSEN, JUDGE. *Affirmed*.

*Matthew Gering*, for plaintiff in error.

*Woolworth & McHugh*, *contra*.

GLANVILLE, C.

This case was before this court under the title *Chicago, R. I. & P. R. Co. v. Sattler*, 64 Neb. 636, where a verdict for the plaintiff herein was set aside. Upon a second trial in the lower court, a verdict was instructed for the defendant company. To reverse the judgment entered thereon, the case is brought here, and, while there are many paragraphs in the petition in error, they are assignments of the same error in varied forms, and the only one that requires consideration is that assigned because of certain peremptory instructions. There is no contention on the part of the plaintiff that the evidence makes a better case this time than before, except as it is claimed that now the evidence establishes the fact that, on other days than the one when the accident occurred, the train on defendant's road, known as number 6, upon which the plaintiff's intestate was a passenger, occasionally took on and discharged passengers at this station. We fail to see any reason in the contention that this fact would change the status of the deceased on the day in question. He was a stranger in the locality, a through passenger from San Francisco to New York on a fast through train, and what may have been

done in regard to receiving passengers on this train, at any other time, has no bearing upon the question of any invitation on the part of the company for him to leave his car on this particular occasion. As we read the evidence, there is no indication of such invitation at this time. This change in the evidence is urged by plaintiff as a reason for holding that the deceased was, at the time of his death, a passenger upon the train within the meaning of section 3, article 1, chapter 72, Compiled Statutes (Annotated Statutes, 10039). We are satisfied with the reasoning and holding of the court upon the former hearing, and do not think there is any change in the evidence which requires any different holding on this question. But, even if we should hold differently, we think the negligence of the deceased was so gross as to be criminal within the meaning of the statute, and that the plaintiff is not entitled to recover under the clearly established facts of the case. The following statement is copied from the previous decision :

"There is little or no dispute over the facts in the case. Leveroni, the deceased, was a through passenger over the railway of the plaintiff in error from the city of Denver to Chicago. The train upon which he was traveling arrived at the station of Alva from the west on schedule time at 2:52 in the afternoon. On its arrival at the station the train went upon a side track to await the arrival and passage of a west-bound train which was then due at that point; its schedule time being the same at that station as the train upon which the decedent was traveling. The train from the east was behind time, and, while the train upon which Leveroni was a passenger was waiting on the side track, Leveroni left his train, crossed over the main track to the depot platform and to a pump a few feet west of the depot, to get a drink of water. About the time that he reached the pump the west-bound train was heard to whistle, when Leveroni left the pump and started on a run for his car, and in crossing the track upon which the west-bound train was approaching the station, was struck by

the approaching train and instantly killed. The east-bound train upon which he was a traveler did not move from the side track until after the deceased was killed, nor had any signal or order been given that said train would move or start. It might be further stated that the evidence is undisputed that there was plenty of good drinking water in the car upon which the deceased was a passenger, and in all the cars of that train."

The holding of the court which was decisive of the case is as follows:

"A through train between Denver and Chicago ran onto a side track at an intermediate station to allow the passage of another through train from the east. A through passenger left his car, crossed the main track of the road to the depot, and went to a pump for a drink of water. He filled his cup from the pump, but, before drinking, heard the whistle of the incoming train, and started on a rapid run to regain his car. From the pump the track over which the incoming train was approaching could be seen for about 100 feet, and three steps from the pump toward the track over which the train was approaching the track was visible for a mile or more. When the passenger reached the track the approaching train was about 50 feet distant from him, and running at a high rate of speed. The passenger attempted to pass in front of the train, and was struck by the engine and killed. *Held*, That, under the circumstances, he was not 'a passenger being transported over the road,' within the meaning of section 3, article 1, chapter 72, of the Compiled Statutes, and the railroad was not liable for damages on account of his death because of his own negligence."

The above statements of fact are substantially borne out by the evidence in the bill of exceptions now before us, and we note the following in addition. The deceased was a man who had gone from place to place, and from state to state, sufficiently to be familiar with railroad travel. He was a man, as alleged and testified, capable of earning \$1,500 per year, and must, therefore, have been of good



intelligence. He was on a through fast train, not stopping at stations generally. His train pulled in on a side track at a very small village, and remained standing there some 15 or 20 minutes before he left the car, and it seems impossible that he did not know the reason for the stop. He then started quite diagonally across the main track and, in doing so, could easily see the incoming train from the east. He hurried to the pump, hurriedly drank, and started back to his car, attempting to cross the main track on a run, so closely in front of the incoming train that he was struck and killed. The distances and his hurried movements show that the train was in plain view when he first crossed the track. Common experience teaches us that the few passengers from his train, and the bystanders that were on the platform at such a time, would be so watching the coming train as to attract attention thereto. The weight of testimony introduced by plaintiff is that the train was coming at the rate of some 45 miles an hour, but some put it at 60. The weight of such testimony shows that the whistle was sounded something like a quarter of a mile away, but one witness says from 40 to 60 rods away. Plaintiff's diagram shows that it was not more than 10 or 12 steps from the pump to where deceased was struck. His deduction from the evidence as stated in his brief is:

"After the train had been on the side track nearly 15 minutes, the deceased crossed the track to a pump upon the company's ground to get a drink of water; he walked in a northeasterly direction from his car, where he could see for more than 2 miles east along the track. No train was in sight. While drinking, he heard a whistle, and, thinking it was his own train, instantly dropped the cup and ran in a southwesterly direction diagonally across the track, without turning his head. When on the south rail, he was struck and killed. The distance from the pump to the place where he was struck was about 32 feet."

Considerable attempt was made to have witnesses give their estimate of time in seconds as to the sequence of events when the accident occurred, but *movements* furnish

a much more reliable criterion than such estimates. Assuming that the train was running 60 miles an hour, and that the whistle was sounded but 60 rods away, which is all the testimony will warrant, more than 11 seconds would then be required for the train to reach the station. This would be time enough for one to run three times the distance from the pump to where deceased was struck. Again, if the deceased went, as testified, from the track to the pump, and had not time to drink before he ran back, and was struck, it is impossible that the train was not in sight when he first crossed the track. His movements clearly show, we think, that he must have known, and did know of the coming train, and that he miscalculated his ability to cross before it.

The language of the Pennsylvania court in the case of *Hess v. Williamsport & N. B. R. Co.*, 181 Pa. St. 492, 37 Atl. 568, may be quoted as apt and appropriate:

"The fires under the boilers were doing their work; the stroke of the lever was kept up; the exhaust of the engine did not cease; the rumbling of the wheels on the rails was not muffled; the undeniable fact is that there were sight and sound of this engine for half a mile before it reached the crossing. We say undeniable, because to deny it is out of accord with the proof and our observation and experience. We must, in the administration of justice, adopt that as truth which our ordinary senses demonstrate to be true. If this unfortunate man could see and hear, which is not questioned, then, before he drove on the track he saw and heard this coming engine and, miscalculating the speed of his own team as compared with that of the locomotive, met his death; the law calls this contributory negligence, and prohibits a recovery. 'One who is struck by a moving train which was plainly visible from the point he occupied when it became his duty to stop must be conclusively presumed to have disregarded that rule of law and of common prudence, and to have gone negligently into an obvious danger.' *Myers v. B. & O. R. Co.*, 150 Pa. St. 386."

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Village of Grant v. Sherrill.

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Complaint is made because courts sometimes take such cases from juries, urging that if juries could find one way, it can not be said that reasonable minds might not differ from the necessity of finding the other. It must be remembered that when a court submits a case to the jury upon such evidence as this, it, in effect, instructs the jury, as a matter of law, that the evidence is sufficient to support a verdict for plaintiff. If it is not, the court should refuse to submit the case to the jury upon the theory that it is so sufficient. To instruct a verdict either way in a proper case is not the invasion of the province of a jury, but to refuse to do so is the denial of a right inherent in the right of trial by jury, and unfair to the jury itself.

We are clearly of the opinion that the trial court did right in taking this case from the jury. This disposes of the only error complained of, and we recommend that the judgment be affirmed.

ALBERT, C., concurs. FAWCETT, C., not sitting.

By the Court: The conclusions announced in the foregoing opinion are approved and the judgment of the trial court is

AFFIRMED.

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THE VILLAGE OF GRANT V. ISAAC W. SHERRILL

FILED FEBRUARY 17, 1904. No. 13,399.

**Municipal Corporations: POWERS.** Section 69, chapter 12 of the laws of 1887, does not authorize or contemplate the issue of negotiable bonds by cities and villages to aid private parties in the construction of a system of waterworks for such city or village.

ERROR to the district court for Perkins county: CHARLES L. GUTTERSON, JUDGE. *Reversed and dismissed.*

*B. F. Hastings*, for plaintiff in error.

*Hall & Marlay* and *W. P. Hall*, contra.

DUFFIE, C.

March 6, 1889, an ordinance was adopted by the village authorities of the village of Grant calling a special election to be held on the 30th of March, 1889, for the purpose of voting on a proposition to issue bonds to the amount of \$4,000, with interest coupons attached, for the purpose of aiding in the construction of a system of waterworks in said village. The election was called, and the proposition received a majority vote of the electors. May 18, 1889, the bonds were duly executed, and were registered in the office of the auditor of state on the 22d day of May, and were duly certified by G. L. Laws, secretary of state, and T. H. Benton, auditor of public accounts. This suit was brought by the defendant in error to recover upon 16 interest coupons, of \$30 each, attached to said bonds.

It is conceded that defendant in error purchased the bonds before maturity, paying value therefor, without knowledge or notice of any defense thereto, except such as the law itself may impose. The district court gave judgment for the defendant in error, and the village has brought the record to this court for review. We do not deem it necessary to discuss any question raised as to the regularity of the proceedings surrounding the issue of the bonds. The rule has become of almost universal application that a *bona fide* purchaser may rely upon recitals, such as the bonds in this instance contain, against any defense of irregularity in their issue. But the question of power to issue a bond is one always open as a defense to its collection and, as we think the question of power in the village to issue the bonds in question will dispose of this case, we will confine ourselves to that particular question. The power claimed on the part of the village is found in subdivision 15, section 69, chapter 12 of the laws of 1887, and is as follows:

"To establish, alter and change the channels of water courses, and to wall them and cover them over, to establish, make and regulate wells, cisterns, windmills, aque-

ducts, and reservoirs of water and to provide for filling the same. Second: To make contracts with and authorize any person, company, or corporation to erect and maintain a system of waterworks and water supply, and to give such contractors the exclusive privilege for a term not exceeding 25 years to lay down in the streets and alleys of said city water mains and supply pipes, and to furnish water to such city or village and the residents thereof, and under such regulations as to price, supply and rent of water meters, as the council or board of trustees may from time to time prescribe by ordinance for the protection of the city, village, or people. The right to supervise and control such corporation, as above provided, shall not be waived or set aside. Third: To provide for the purchase of steam engines, and for a supply of water for the purpose of fire protection and public use, and for the use of the inhabitants of such cities and villages, by the purchase, erection, or construction of a system of waterworks, and by maintaining the same; *Provided*, That all contracts for the erection or construction of any such work, or any part thereof, shall be let to the lowest responsible bidder therefor, upon not less than 20 days' public notice of the terms and conditions upon which the contract is to be let having been given by publication in a newspaper published in said city or village, and if no newspaper is published therein, then in some newspaper published in the county; *Provided, further*, That no member of the city council or board of trustees, nor the mayor, shall be directly or indirectly interested in such contract, and in all cases the council or board of trustees, as the case may be, shall have the right to reject any and all bids that may not be satisfactory to them. Such cities or villages may borrow money or issue bonds for the purpose, and levy and collect a general tax in the same manner as other municipal taxes may be levied and collected, for the purchase of steam engines and for the purchase, erection or construction, and maintenance of such waterworks, or to pay for water furnished such city or village under contract, to an amount

not exceeding 7 mills on the dollar in any one year on all the property within such city or village as shown and valued upon the assessment rolls of the assessor of the proper precinct or township, in addition to the sum authorized to be levied under subdivision one of this section, and all taxes raised under this clause shall be retained in a fund known as 'water fund.' "

The authorities all agree that legislative authority is necessary to authorize counties, townships and school districts to borrow money and issue negotiable bonds, or to issue negotiable bonds in aid of any public enterprise. Such bodies exist for purposes of local and police regulation and, having the power to levy taxes to defray all public charges created, they have no implied power to make commercial paper of any kind, unless it is clearly implied from some express power which can not be fairly exercised without it. *Jury v. Britton*, 15 Wall. (U. S.) 566. It has been said that it is one thing to have the power to incur a debt and to give proper vouchers therefor, and a totally different thing to have the power of issuing obligations unimpeachable in the hands of third persons. *Maiborne County v. Brooks*, 111 U. S. 400. Thus the power to build a courthouse does not include the power to issue municipal bonds in payment therefor. *Hill v. Memphis*, 134 U. S. 198. In *Brinkworth v. Grable*, 45 Neb. 647, it was said:

"It is settled law that a municipal corporation has no power to issue its bonds in aid of a work of internal improvement unless expressly authorized by statute to do so."

The question then is, does the statute above quoted authorize cities and villages to issue negotiable bonds to aid private parties in the construction of a system of water-works for the municipality making the donation? The law, while clumsily drawn, is clear, we think, in providing two methods by which the municipality may secure the benefit of a water supply. First: "To make contracts with and authorize any person, company or corporation to

erect and maintain a system of waterworks and water supply, and to give such contractors the exclusive privilege for a term not exceeding 25 years to lay down in the streets and alleys of said city water mains and supply pipes, and to furnish water to such city or village and the residents thereof, and under such regulations as to price, supply and rent of water meters, as the council or board of trustees may from time to time prescribe by ordinance for the protection of the city, village or people." Second: "By providing for the purchase of steam engines, and for a supply of water for the purpose of fire protection and public use, and for the use of the inhabitants of such cities and villages, by the purchase, erection or construction of a system of waterworks, and by maintaining the same." We have quoted the language of the statute relating to the two methods which the municipality may adopt. If the second method is adopted, the contract must be let to the lowest responsible bidder. Public notice must be given, and no member of the city council or board of trustees, nor the mayor, shall be directly or indirectly interested in the contract, and the municipality may borrow money or issue bonds for the purpose. If the first plan is pursued, then the municipality is authorized to levy and collect a general tax for the purchase of steam engines, or to pay for water furnished to an amount not exceeding 7 mills on the dollar in addition to the sum authorized to be levied for other purposes. Or, if a system of waterworks already constructed is purchased by the municipality, then bonds may be issued in payment therefor. Nowhere in the law do we find express or implied authority, authorizing a donation to be made to private parties, who may seek a franchise from the city for the use of the streets and alleys in which to lay mains, and to furnish water to the municipality and its citizens; and, even if such authority were found in the statute, we doubt very much the power of the legislature to authorize a donation for such a purpose. Under our constitution, donations can be made by municipal authorities only to aid in

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works of internal improvement, and a system of water-works designed to supply municipalities and their citizens with water facilities is not, we think, an internal improvement within the meaning of that instrument. The bonds in question contain the following recital: "This bond is one of a series of eight bonds of \$500 each issued for the purpose of aiding in the construction of a system of water-works for the use of said village under and by authority of chapter 14, Compiled Statutes of Nebraska, 1887, entitled 'Cities of the Second Class and Villages,' section 69." The bonds therefore bear upon their face ample evidence of their own invalidity, and no one can claim to be a *bona fide* purchaser of a bond which carries on its face indubitable evidence of its unlawful character.

We recommend a reversal of the judgment of the district court and a dismissal of the action.

FAWCETT, ALBERT and GLANVILLE, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is reversed and the cause dismissed.

REVERSED.

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GEORGE W. MARSH, SECRETARY OF STATE, ET AL. V. ORVILLE M. STONEBRAKER.

FILED FEBRUARY 17, 1904. No. 13,498.

1. **Statutes:** TITLE TO. Chapter 124 of the laws of 1903 does not, in terms, vest title and ownership of the statutes therein mentioned in the officers to whom said statutes are to be delivered by the secretary of state.
2. **Act of Legislature:** CONSTITUTIONALITY. An act of the legislature will not be declared unconstitutional and void, on the presumption that it will be used as a basis to assert an unjust or illegal claim to the property of the state.
3. ———: ———: PUBLICATION OF STATUTES. The legislature is not prohibited by any provision of the constitution from granting to



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a person the right to publish the statutes of this state, and making such statutes *prima facie* evidence of the law, nor from purchasing such number of copies thereof as the legislature may deem necessary for the use of its officers.

ERROR to the district court for Lancaster county: EDWARD P. HOLMES, JUDGE. *Reversed and dismissed.*

*F. N. Prout, Attorney General, and Norris Brown, for plaintiffs in error.*

*Frank M. Hall and C. C. Marlay, contra.*

DUFFIE, C.

At its last session the legislature passed an act (Laws, 1903, ch. 124) in the following words:

*"Be it Enacted by the Legislature of the State of Nebraska:*

"Sec. 1. That J. E. Cobbeey is authorized to prepare a statute of the state of Nebraska to be prepared and published without cost to the state.

"Sec. 2. Said statute shall contain the constitutions of the state and such other preliminary matter as has hitherto been published in the statutes and such matter as is usually published in first class statutes. All the public laws now in force or that shall be passed by this legislature arranged in chapters with proper headings and titles, the whole thoroughly indexed shall be annotated on the same plan as the 'Annotated Code' of 1901 published by him and published in two volumes.

"Sec. 3. The said statute shall be published as soon after the adjournment of this legislature as is practicable with first class work; and five hundred (500) sets of two volumes each shall be immediately delivered to the secretary of state to be distributed by him to members of this legislature and state officers as provided by law. The state shall pay therefor the sum of nine dollars (\$9) per set of two volumes each.

"Sec. 4. The said statute shall be received in all the courts of the state as *prima facie* evidence of the law."

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September 28, 1903, the defendant in error commenced this action in the district court for Lancaster county alleging, among other things, "that under and in pursuance of said act the said J. E. Cobby had in preparation said statute; that the same will be completed, printed and published and ready for delivery in a short time and that it is the intention of the said J. E. Cobby to deliver 500 sets of two volumes each to the secretary of state, and it is the intention of said secretary of state to receive and distribute the same for the state of Nebraska to the members of the legislature of said state and the said officers thereof, in compliance with section 3 of said act, unless restrained by an order of this court from so doing, and that, when said statutes are so by the said J. E. Cobby delivered to the secretary of state, it is the intention of said auditor to draw his warrant upon the treasurer of the state of Nebraska for the payment of the same for the sum of \$4,500, unless restrained by an order of this court from so doing." It is further alleged that "the act is unconstitutional in that section 4, article III of the constitution, fixes the compensation of members of the legislature at the rate of \$5 a day during their sitting, and 10 cents for every mile they shall travel in coming to and returning from the place of meeting of the legislature; provided, however, that they shall not receive pay for more than 60 days at any one sitting, nor more than 100 days during the term, and that neither members of the legislature nor employees shall receive any pay or perquisites other than their salary and mileage: That it further infringes section 15, article III of the constitution, which provides that the legislature shall not pass local or special laws granting to any corporation, association or individual any special or exclusive privilege, immunities or franchise whatever, and that the act grants to J. E. Cobby a special privilege in the matter of publishing the Nebraska statutes." For these reasons an injunction was asked against the plaintiffs in error, enjoining them from receiving and distributing or paying for said statutes. A demurrer to this peti-

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tion was overruled by the district court, and, plaintiffs in error having elected to stand upon their demurrer, a perpetual injunction was granted as prayed in the petition; and the case has been brought here on error.

The theory upon which the defendant in error seeks to sustain this action is, that the legislature, in the enactment of this statute and in the appropriation which was made to pay for the books, contemplated and intended that absolute title to them should pass to the members of the general assembly. The appropriation bill contains the following: "To pay for five hundred copies of the statutes for state officers and the present members of the legislature, the members of the next legislature and the counties of the state, \$4,500." It is urged in argument that, unless it was intended to give the members of the legislature which passed the act absolute title to the books received by them, it would be unnecessary to provide for the delivery of another copy of the books to the members of the next legislature, and it is insisted that, if title to the books is vested in the members of the legislature by the terms of the act and of the appropriation, it is a prerequisite within the meaning of the constitutional provision above referred to. On the other hand, the attorney general insists that title to these statutes does not pass under the act, that it was the purpose and intent of the legislature to provide each of the members with a copy of the statute to be used during their term of office, the better to qualify themselves for the performance of the duties imposed upon them as members of the legislature.

We apprehend that no objection can be taken to furnishing the members of the legislature and other state officers with copies of the general statutes of this state to be used during their terms of office. The executive, judicial and legislative officers must each alike have access to the general laws of the state, to enable them to perform their official duties in an intelligent manner, and it is as necessary that their offices be supplied with these statutes as with office furniture and other supplies. As we understand

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from counsel for defendant in error, it is not contended that there is any constitutional objection against the state furnishing the use of these statutes to the members of the general assembly and other state officers, but it is insisted that the members of the legislature have no right to take these statutes from the capitol to their homes, or to have the use of them at any time except when the legislature is in session. With this contention we can not agree. No one but the chief executive can know when a special session of the legislature may be called, and, until the time when a member's successor is elected and qualified, he may be required on any day to resort to the capitol to consider some important interest of the state. During all of his term, he is entitled to the use of the statutes of the state as one of the incidents of the office which he holds, and as a means of informing himself in relation to his duty, when called upon to act officially as a lawmaker for the state. There is nothing in the terms of the act, as we read it, which pretends to vest in the officers furnished with these books an absolute title thereto, or anything more than the use thereof during their term. No party connected with this case is asserting title to these statutes under this act and, until some officer who is to be supplied claims title to the books delivered to him, and neglects and refuses to deliver them to his successor in office, we do not know how the question of title can be tried and determined. We can not in this case more than in any other determine a question in advance of a controversy. That the state has a right to purchase these statutes is not a question open to discussion. That question was before the court in *State v. Wallich*, 12 Neb. 234, and it was there said:

"Whether this number were reasonable, or prodigal, under all the circumstances that should affect it, is not to be here considered. The legislature saw fit to designate the number 'required by the state,' and that designation is not subject to review. That is a matter with which neither the respondent nor this court has anything whatever to do."

Until the question of title to these books arises in a proper action, and between proper parties, we are not called upon to decide the question, or to give our views in advance of an actual case properly instituted. We can not declare a statute void upon the assumption that some one, at some future time, may use it as a basis for asserting an unjust claim to property delivered to him as a state official, and upon the presumption that the officers of this state will not surrender to the state, or to their successors in office, the property received from the state to enable them to intelligently perform their official duties if the property should, under the law, be surrendered either to the state or to their successors. The objection that this statute is obnoxious to the provision of our constitution against the granting of any special or exclusive privilege is not, in our judgment, well taken. Mr. Cobbey is the only party having these books. If the state wishes to purchase, it must purchase from him. It is true that there is another statute published, and which the state could purchase from another party, but we know of no prohibition resting upon the legislature to determine, for itself, which of these statutes it will buy for the use of the state officers. If this purchase from Mr. Cobbey is granting to him a special or exclusive privilege because he is the only person owning this particular kind of a statute, and the legislature is prohibited from dealing with him on that account, then it must refuse to deal with anyone who is the exclusive possessor of a certain kind of property, however great the need of the state may be for the use of such property. The state having, as we think, an undoubted right to make this purchase, it is not for the courts to interfere or to take any action in the matter. If at some future time, because of a claim of ownership made to these statutes by any officer to whom they may be delivered, the question of title shall arise, that question will be determined; together with the other question argued as to whether, if title does pass to the recipient, it constitutes a perquisite.

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City of South Omaha v. Meehan.

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Because the decree of the district court prohibits the secretary and auditor of state from carrying into effect a law which, upon its face, is valid, we recommend that its judgment be reversed and the cause dismissed.

LETTON and KIRKPATRICK, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is reversed and the cause dismissed.

REVERSED.

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CITY OF SOUTH OMAHA V. MARY MEEHAN.

FILED FEBRUARY 17, 1904. No. 13,217.

1. **Action to Quiet Title: ADVERSE POSSESSION.** In an equitable suit to quiet title, a municipal corporation being defendant claimed title to the land in controversy by dedication as a public street, but offered no proof of this allegation. The plaintiff showed adverse possession in himself and grantor for more than 10 years prior to the commencement of the action. *Held*, That plaintiff was entitled to a decree.
2. ———: ———. Where one goes upon land under no color of title, but as a mere intruder, he can acquire title by adverse possession only to so much of the land as he actually occupies and uses for the period prescribed by statute.
3. **Evidence.** Evidence examined, and *held* sufficient to sustain a decree for plaintiff to so much of the land as she is shown to have used and occupied.

ERROR to the district court for Douglas county: CHARLES T. DICKINSON, JUDGE. *Reversed with directions.*

A. H. Murdock, for plaintiff in error.

C. R. Scott and E. H. Scott, *contra*.

KIRKPATRICK, C.

This was an action to quiet title brought by Mary Meehan, defendant in error, against the city of South Omaha,

plaintiff in error. There was judgment for plaintiff in the lower court; this proceeding in error being prosecuted by the city. Plaintiff, in her petition in the lower court, alleged that the property involved in this suit, and which was described fully in the petition, was her absolute property because of adverse possession in herself and her grantors. For answer, the city pleaded its corporate existence as a municipality under the laws of this state; that the property described in plaintiff's petition was the property of the city by dedication as a public highway; that the possession of plaintiff and her grantors was permissive and temporary, and so continued until the passage of an ordinance by the city making the erection of any structure on the public highway a misdemeanor, and the presence of any house or building on the streets and alleys a nuisance; that, since the passage of the ordinance referred to, the plaintiff and her grantors have been guilty of maintaining a nuisance, and could not acquire title under possession. For affirmative relief, the city asked that the premises be awarded to it, and that its absolute title in fee be decreed. The reply filed by plaintiff was, in effect, a general denial.

The facts shown by the evidence may conveniently be stated, so far as necessary, in the consideration of the errors assigned and argued by the city upon which it relies for reversal. The first contention relates to the sufficiency of the evidence to prove all the elements essential, under the decisions of this court, to title by adverse possession, particularly, that plaintiff failed to show that she had held adversely, with the intention of holding it as owner, for 10 years or more.

This action was commenced in May, 1900. Plaintiff went into possession of the premises under an instrument dated in September, 1897. This instrument is, in form, a bill of sale, by which Melissa Buckner, a widow, in consideration of the sum of \$85 grants, sells, transfers and delivers to plaintiff "the following described goods, chattels and personal property, to wit: That one and one-half story frame cottage on the west line of 26th street on P

street, and known as the Buckner property, in South Omaha. To have and to hold, all and singular, the said goods, chattels and personal property," etc.

There is sufficient evidence to establish that Mrs. Buckner, named as grantor in the instrument just referred to, built the house in 1886, and from and after that time, and up to the time of the transfer to plaintiff, had lived in the house and on the premises, during which period she maintained an open, continuous, exclusive and adverse possession thereof, claiming the property as her own. There is no conflict in the record as to the claim by plaintiff to the land on which the house stood, during the period of her occupancy after the purchase from Mrs. Buckner.

The contention based on this state of facts seems to be that, as the instrument from Mrs. Buckner to plaintiff only purports to transfer the title to personal property, goods and chattels, plaintiff succeeded only to Mrs. Buckner's rights to the property mentioned in the instrument, and therefore can not tack her own adverse possession to that of Mrs. Buckner. Our examination of the record leads us to the conclusion that there can be no question as to the intent of both parties, plaintiff and Mrs. Buckner, that the former should succeed to all the interest of the latter in the property in controversy. Nor do we see any serious difficulty in suggestion of counsel, that evidence as to the transfer to plaintiff by Mrs. Buckner of her rights to the land in dispute, tends to vary the terms of the bill of sale heretofore referred to. It is to be kept in mind that the claim of plaintiff is not based upon this bill of sale, which was introduced in evidence by defendant city, but rather upon an oral contemporaneous agreement, at the time of the making of the bill of sale, by which plaintiff succeeded to the rights of Mrs. Buckner in the land. We think it is well settled that the right of one person holding land adversely may be transferred to another verbally. *Murray v. Romine*, 60 Neb. 94. And if the testimony in this case is sufficient, and we think it is, to show that such transfer was made, then the possession of plain-



tiff may be tacked to that of Mrs. Buckner to make out her title by prescription. *Lantry v. Wolff*, 49 Neb. 374.

Plaintiff asked to have her title quieted in a strip of land bounded on the west by Railroad Avenue, sometimes called 27th street, on the east by 26th street, on the north by a line which would be made by extending the north line of P street from 26th street to Railroad Avenue, and on the south by a similar line made by extending the center line of P street from 26th street to Railroad Avenue. Counsel for the city contend that there is nothing in the proof to support a decree awarding this definite strip to plaintiff, the argument being that she was not shown to have ever been in the actual possession and use of all of this strip, so bounded. The evidence shows that the portion of the land which was not in actual use was so precipitous and bluffly as to make it unavailable for any purpose whatever, and some cases are cited by counsel for plaintiff to the effect that, where the land is cut up by streams, sloughs or bluffs, it is not practicable or possible for the claimant to be in the actual possession of every part of it, and that such actual possession is not required. *Tremaine v. Weatherby*, 58 Ia. 615.

In the case at bar, however, Mrs. Buckner was a mere intruder, entering upon the land without color of title. The rights of her grantee must, therefore, be tested by the same principles which would be applied to Mrs. Buckner. It is undisputed that all of the land described in the decree was not being actually used or occupied. Under the facts in this record, we can find no principle of law upon which the decree can be sustained as to the portion of the strip which plaintiff did not actually occupy.

"There is a marked distinction," says NORVAL, C. J., in *Omaha & R. V. R. Co. v. Rickards*, 38 Neb. 847, "between a possession acquired under a claim of right or color of title, and where possession of land is taken and held by a mere usurper or intruder. Where a party's occupancy is under a color of title, his possession is regarded as being coextensive with the entire tract described in the instru-

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ment under which possession is claimed. On the other hand, where one enters without color of title, his possession is confined to the land actually occupied. It is firmly settled in this state that while color of title is not indispensable to adverse possession, yet, when the occupancy is without color of title, possession is limited to the land actually occupied," citing *Gatling v. Lane*, 17 Neb. 80; *Haywood v. Thomas*, 17 Neb. 237.

The rule announced in the cases cited by counsel for plaintiff, to the effect that actual possession and use of every portion of land claimed adversely is unnecessary to sustain the claim, where the character, situation and topography of the land makes this universal use impossible, applies, we think, only to adverse claimants holding land under some color of title, or under an instrument which defines with sufficient precision the exact boundaries of the land claimed to be occupied adversely. Under the facts in this case, we can see no escape from the application of the principle announced in the *Rickards* case, *supra*, that where the occupancy is without color of title, possession must be limited to the land actually occupied. We are, therefore, of the opinion that the learned trial court erred, in so far as he quieted title in plaintiff to any portion of the land in dispute, which the proof showed she did not actually occupy.

A further contention of the city is that the trial court erred in quieting title in plaintiff as against the city of South Omaha, because of the provisions of section 6 of the code, as amended by act of the legislature approved April 1, 1899, providing that the limitations upon an action for the recovery of real estate therein provided shall not be held to apply to a municipal corporation seeking to recover title or possession of a public street. The record shows that title by adverse possession had ripened in Mrs. Buckner, plaintiff's grantor, before the transfer of her interest to plaintiff, which occurred prior to the enactment of the amendment in 1899. We do not think it can be successfully contended, that the amendment referred

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to can have the force of taking away a right of recovery upon a cause of action which had accrued prior to its enactment. A legislative enactment will always be construed to operate prospectively, unless the intent of the lawmaking power to the contrary is plainly expressed. *State v. City of Kearney*, 49 Neb. 337.

It may be added that, while it is satisfactorily established that there was a continuous user of the premises on which the house and other buildings were located under claim of ownership, it is also shown by the evidence that no portion of the property claimed by plaintiff was ever used by the city as a public highway, and, if further proof were needed that it never claimed or asserted title to the land as against the occupant during this long period, it would be found in the fact that, many years before the commencement of this action, 26th street was paved, and, at that time, a permanent curb was placed along the east line of the premises in controversy, extending through the entire width of P street, from which it would seem any rational person would be justified in inferring an abandonment by the city of any claim to the property occupied by plaintiff.

In its answer, the city laid claim of title to the premises by dedication as a public highway. There is no proof of any kind in the record that the city ever obtained title to the tract in this way or in any other. We know of no rule that entitles the city to the presumption that the tract of land in dispute was ever dedicated to the city as a public street. It is quite conclusively shown by this record, that no part of the disputed tract was ever used by the city as a highway. Many years before the commencement of this action, the city caused 26th street to be paved, and, at that time, laid a permanent stone curb along the west line of 26th street, extending the entire width of that street, as already stated. It would seem, therefore, that in any event the decree, in denying relief to the city of its affirmative prayer, was right.

We find the record without error, with the exception

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already pointed out, and it is therefore recommended that the judgment of the district court be reversed and the cause remanded, with directions to the district court to enter a decree in favor of plaintiff, Meehan, in so much of the property described in her petition as, by the evidence, she may be shown to have actually occupied.

DUFFIE and LETTON, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is reversed and the cause remanded to the district court, with directions to enter a decree in favor of plaintiff, Meehan, quieting title in her to so much of the property as, by the evidence, she may be shown to have actually occupied.

JUDGMENT ACCORDINGLY.

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HENRY F. CADY V. FRANK G. USHER.

FILED FEBRUARY 17, 1904. No. 13,392.

**Foreclosure of Mortgage: DEFICIENCY JUDGMENT.** Where it is disclosed that the notes, to secure which a mortgage is given, are barred by the statute of limitations at the time of the commencement of the foreclosure proceedings, the mortgagee is not entitled, under the provisions of section 847 of the code as it existed prior to the legislative session of 1897, to a deficiency judgment, after the coming in of the report of the sale of the mortgaged property.

ERROR to the district court for Fillmore county: GEORGE W. STUBBS, JUDGE. *Affirmed.*

*F. B. Donisthorpe*, for plaintiff in error.

*H. P. Wilson*, contra.

KIRKPATRICK, C.

This is a proceeding in error prosecuted from a judgment of the district court for Fillmore county, denying

the motion of plaintiff in error, who was plaintiff below and who will be styled herein as plaintiff, for a deficiency judgment in a mortgage foreclosure proceeding. On October 5, 1901, plaintiff instituted a foreclosure proceeding upon a mortgage securing three promissory notes maturing January 26, February 26 and April 26, 1896, respectively. More than 5 years had elapsed after the maturity of the notes before the foreclosure proceedings were commenced. Among other defenses, the answer pleaded the statute of limitations. On February 12, 1902, a trial was had, resulting in a decree of foreclosure in favor of plaintiff for the sum of \$1,466.25. The sheriff was directed to sell the premises included in the mortgage as upon execution. A stay was taken, and after its expiration, a sale was duly made, and, upon the return of the sheriff to such sale, it was disclosed that there was a deficiency amounting to \$1,543.63. Plaintiff afterwards filed a motion for a deficiency judgment, which, on June 30, 1903, was denied on the ground that the notes in suit had been fully barred by the statute of limitations at the time the foreclosure proceedings were commenced.

It is contended by plaintiff that, because in the decree of foreclosure an amount was found due to the plaintiff from the defendant, and an order entered that, unless defendant made payment within 20 days, an order of sale should issue, this amounted to a final judgment against defendant, fixing his liability for the deficiency, and that defendant could not, at a subsequent time, be permitted again to defend. We are unable to accept this view. The finding and decree of foreclosure did not amount to a personal judgment against the defendant. *Alling v. Nelson*, 55 Neb. 161. The mortgage was not barred by the statute, and plaintiff was entitled to a decree of foreclosure; but, before a deficiency judgment could have been rendered, the court must have found from the evidence that defendant was liable on the notes in suit, and, as it was disclosed by the pleadings and the evidence that the notes were barred, plaintiff was not entitled to a deficiency

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judgment thereon. It follows that the judgment of the trial court is right.

A second and equally valid reason is disclosed by the record why the judgment must be affirmed. On June 30, 1903, the cause seems to have been before the district court upon the motion of plaintiff for a deficiency judgment and the pleadings in the case, and judgment was entered against plaintiff dismissing his application for a deficiency judgment. Plaintiff was given 40 days within which to prepare and settle a bill of exceptions containing the evidence heard by the trial court, and we find this bill of exceptions in the record; but no motion for a new trial was ever filed in the case or ruled on by the trial court, and this would seem to preclude plaintiff from obtaining any relief in this court, even had the action of the trial court been erroneous, which clearly it is not.

It is therefore recommended that the judgment of the district court be affirmed.

DUFFIE and LETTON, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is

AFFIRMED.

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HANS H. PETERSON, APPELLANT, V. JAMES W. FISHER,  
APPELLEE.

FILED FEBRUARY 17, 1904. No. 13,424.

**Highway: COUNTY BOARD: JURISDICTION.** If the public has acquired no right by prescription or dedication to a way across the land of an individual, the court may examine the proceedings by which it was attempted to lay out a highway across the same, to ascertain whether or not the county board had jurisdiction to act, and the lapse of time alone will not supply a jurisdictional defect in the proceedings.

APPEAL from the district court for Antelope county:  
JOHN F. BOYD, JUDGE. *Reversed with directions.*

*E. D. Kilbourn*, for appellant.

*S. S. Thornton*, for appellee.

LETTON, C.

This action was brought by the plaintiff to enjoin the defendant as road overseer from entering upon his premises and removing a fence from a portion of the same, where defendant claims that a public road exists, the plaintiff denying the existence of the highway. It appears that, in 1876, a petition was filed with the county board of Antelope county, praying for the location of a road, part of which ran over the land where this dispute arises between sections 11 and 14. This petition was signed by 20 persons, citizens of Antelope county. A notice of the filing of said petition was filed with the county clerk of said county, with a certificate of the posting of the same. On the 5th day of July, 1876, one Amos West was appointed commissioner to view and locate the road as petitioned for. West qualified according to law, and reported favorably upon said road, and, on the 2d day of January, 1877, the report of Amos West as commissioner of said road number 23 was accepted by the county board, and the clerk instructed to notify him to survey and plat the same according to law. Pursuant to these instructions, the commissioner employed a surveyor and chain carriers, laid out the road, and filed his field notes with the county clerk. Section 11 was then open prairie and section 14 was occupied. It is apparent from the testimony that a portion of the road, so located, has been traveled by the public for a great many years, but that the portion of the same lying between sections 11 and 14 has only been traveled, occasionally, for a portion of the distance along the line between said sections. It seems that the road between sections 12 and 13, immediately east of the disputed portion, is quite well traveled, and that the travel westward usually proceeds along the section line between

sections 12 and 13, the greater portion then turning north of the section line about 80 rods, thence going west again, but that a few persons have traveled on west between the south line of section 11 and the north line of section 14 for about three-fourths of a mile, to a point nearly north of the plaintiff's house, where they turned to the south and passed around by the plaintiff's house to the west again. The road between sections 10 and 15 running east of the disputed point is also a well traveled road. The plaintiff is the owner of the northwest quarter of section 14 and the southeast quarter of section 11, and lives on the southwest corner of the northwest quarter of section 14. He testifies that there has been no travel along the disputed line because it is all full of gulches, and that two years ago he put up a fence upon the line across the disputed road.

The plaintiff contends that the proceedings by which the county board attempted to establish the road were defective and void for want of a proper petition and notice, and that no public road has ever been opened or used across the premises. The proceedings were had over 25 years ago. After the lapse of so many years, if there had been user by the public for ten years, the presumption would be that the proceedings to establish the road were regular, and the court would not examine the original proceedings for the laying out of the road to determine whether or not they are valid. *City of Beatrice v. Black*, 28 Neb. 263.

The question in this case is, whether the presumption arising from the long lapse of time since the attempted proceedings to lay out a highway, a portion of which is in dispute, is conclusive against the owner of premises over which the public has only occasionally traveled a portion of the disputed highway. In the case of the *City of Beatrice v. Black*, *supra*, it appeared that the proceedings to lay out the road were defective, and the court say:

"If a petition is duly presented to the proper tribunal praying for a public road from one point to another in



the county, and such petition is granted and the road located and opened for travel and is used by the public generally, the right in the public will become complete after 10 years, and the court will not look at the original proceedings to determine the validity of the road but to ascertain the extent of the location. \* \* \* The rule would be different if the action was brought before the bar of the statute was completed."

In that case the court found that a legal highway existed by reason of the public having acquired an easement in the highway on account of the road being traveled and used by the public generally for over 10 years.

It is not the long period of time that has passed since the defective proceedings were had that renders them sacred from attack, but it is the prescriptive right gained by the public through its use and occupation of the highway for more than the statutory period of limitation. The lack of jurisdiction to act can not be supplied by the lapse of time. It may be that the defective proceedings may be considered by the court as defining the extent of the prescriptive right claimed, but not as a basis of the same. Perhaps the court may look to them to ascertain the extent of the claim of the public, in the same manner as it would have recourse to a deed giving color of title to determine the extent of an adverse possession claimed by an individual under it, but this is not determined. The evidence in this case shows that, while both east and west of the line between sections 11 and 14 the road was freely traveled by the public, yet it further shows that the main line of travel was turned aside on the east line of these sections, was diverted to the north, thence westward across section 11, thence southward after having passed over said section to a continuation of the original line running east and west. The plaintiff testifies that he had a gate at the east line of said section, and that a few persons came through the gate, passed along between the sections, thence southward to his house, but there is no evidence that any public work was ever done upon, or that the public in general

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ever traveled on, the line between sections 11 and 14, and there is no evidence of travel between these sections for as long a period as 10 years. This being the case, no prescriptive right was acquired by the public as against the owners of the land in said sections, and, since the plaintiff in this case never recognized any right of the public to pass over his premises, it is apparent that, unless the original proceedings were valid, no public highway exists over the land of the plaintiff at the place in dispute. *Gchris v. Fuhrman*, 68 Neb. 325; *Engle v. Hunt*, 50 Neb. 358; *Hill v. McGinnis*, 64 Neb. 187.

The original proceedings were defective in this, that no petition signed by 10 landholders of the vicinity was ever presented to the county board, that there is no proof that any notice was ever posted upon the court house door, or that more than one notice was ever posted anywhere. These were essential prerequisites to the jurisdiction of the county board, and without them its action was a nullity. *Doody v. Vaughn*, 7 Neb. 28. For these reasons the proceedings were of no validity, and by the same the public acquired no rights as against the plaintiff.

Since no highway was legally established over the plaintiff's premises by legal proceedings, and none has been acquired by prescription, he is entitled to an injunction in this case.

We recommend that the cause be reversed and remanded, with directions to the district court to enter a decree in accordance with this opinion.

DUFFIE and KIRKPATRICK, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, this cause is reversed and remanded, with directions to the district court to enter a decree in accordance with this opinion.

JUDGMENT ACCORDINGLY.

## W. F. COOK V. STATE OF NEBRASKA.

FILED MARCH 2, 1904. No. 13,038.

1. **Criminal Law: FALSE PRETENSES.** To constitute the crime of obtaining money under false pretenses, the pretense or pretenses relied on must relate to a past event or an existing fact; any representation or assurance in relation to a future transaction, however false and fraudulent it may be, is not within the meaning of the statute.
2. **Instruction: ERROR.** On the trial of one charged with the violation of section 125 of the criminal code, the giving of an instruction which, in substance, informs the jury that if they find that the representations relied on amount to a promise to perform a future act, such promise must be carried out in good faith, and a failure to fulfil it, with intent to defraud, will render the defendant guilty the same as though such representations related to a past event or an existing fact, is reversible error.

ERROR to the district court for Cheyenne county: GEORGE W. NORRIS, JUDGE. *Reversed.*

*W. P. Miles, James L. McIntosh and Hamer & Hamer,*  
for plaintiff in error.

*Frank N. Prout, Attorney General, contra.*

BARNES, J.

An information was filed in the district court for Cheyenne county against the plaintiff in error, charging him with the crime of obtaining money under false pretenses by falsely stating, on the 1st day of October, 1901, to one J. W. Wehn, that he, the plaintiff, was the owner of and had in his possession 150 head of yearling steers, branded with a "Y" on the right hip; that he also had in his possession and owned 100 tons of hay, all situated on his ranch in Banner county, Nebraska; that, by means of such false statements or pretenses, he procured a loan of money from the said Wehn, amounting to \$1,200; that he gave his note therefor due in 6 months thereafter, and secured the payment thereof by a chattel mortgage on the

steers and hay above mentioned. The truth of these statements was properly negatived by the information; in fact the charge contained therein was sufficient.

On the 18th day of November, 1902, the plaintiff appeared at the bar of the court and entered his plea of not guilty. Immediately thereafter he was tried, found guilty as charged in the information, and was sentenced to the penitentiary for the period of 3 years. He thereupon prosecuted error. His petition contains several assignments, but we will only consider the one which alleges error in the instructions.

It may be said, however, in passing, that the proof showed that the representations set forth in the information were not made to J. W. Wehn, but to one Burke, and, in order to avoid the effect of this variance, Burke testified that he was the agent of Wehn, and that it was Wehn's money which was obtained from him by means of the representations in question. It is unnecessary, however, for us to determine whether or not this was a fatal variance.

It appears that the plaintiff denied that he made the representations set forth in the information. He admitted that he received the money; that he gave the note and mortgage in question, but claimed, and furnished considerable evidence tending to show, that in the conversation between himself and Burke, at the time he borrowed the money, he stated that he did not own all of the cattle described in the mortgage, but was borrowing the money for the purpose of purchasing them; that he agreed to purchase them, and also agreed that as soon as they were purchased he would brand them and place them on his ranch, thus making them subject to the mortgage, which he then and there executed. After the introduction of the evidence, the trial judge charged the jury, among other things, as follows:

"The defendant in this case admits the giving of the mortgage as claimed by the prosecution, but claims that he had an agreement and understanding with C. H. Burke that the money obtained by the giving of the said mort-

gage should be used by him for the purpose of buying steers, such as described in the mortgage; if you find from the evidence that at the time said mortgage was given the defendant did not represent to the said Burke that he had the steers therein described, but that it was understood and agreed between the defendant and said Burke that said money so obtained should be used by the defendant to purchase steers of that description, then the defendant could not be held liable by you for the representations contained in said mortgage, as to his having possession of such steers at said time, but if such agreement were made it would have been the duty of the defendant to use, in good faith, the money so obtained for the purpose of purchasing the steers, such as is described in said mortgage, but if you find that he did not use said money for said purpose, and at the time of obtaining said money he did not intend to purchase said steers as agreed upon, but intended to defraud the said Wehn out of the same, then the defendant would be liable the same as though he had falsely represented that he had in his possession the steers described in the mortgage."

By this instruction the jury were told, in effect, that the pretense or pretenses relied on by the prosecution need not relate to a past event or an existing fact; that if the representation or assurance related to a future transaction or a future promise, still the plaintiff would be guilty of the crime of obtaining money under false pretenses; and it is this instruction of which he complains.

It is a well settled rule of the criminal law that the pretense or pretenses relied on to constitute the crime must relate to a past event or an existing fact; that any representation, or assurance, or promise, in relation to a future transaction, however false and fraudulent it may be, is not within the meaning of the statute. Maxwell, Criminal Procedure, 129; *Dillingham v. State*, 5 Ohio St. 280. The misrepresentations must be of a fact and not a statement of an opinion, or the making of a promise. 1 McClain, Criminal Law, sec. 668. This rule is so well understood that it is

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unnecessary to cite any further authorities to support it. The law department of the state, while not confessing error, does not contend that the instruction is a correct statement of the law. The giving of this instruction was prejudicial error, for which the judgment of the district court is reversed and the cause remanded for a new trial.

REVERSED.

HOOLOMB, C. J., concurs. SEDGWICK, J., absent and not sitting.

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SONEY FORD V. STATE OF NEBRASKA.

FILED MARCH 2, 1904. No. 13,296.

1. **Manslaughter.** Where one points a loaded pistol at another, although he has some reason to think it is not loaded, he is guilty of an assault; and if he pulls the trigger, thus causing the pistol to be discharged and the person assaulted is killed thereby, he is guilty of manslaughter.
2. **Instructions.** Instructions requested by the defendant examined, and held properly refused.
3. **Request for Instructions.** A defendant in a prosecution for murder, is ordinarily entitled to have the theory of his defense submitted to the jury by proper instructions; but where, by his own theory, he is guilty of manslaughter, and the jury so find, his rights are not prejudiced by a failure to give his instructions.
4. **Sentence Reduced.** The defendant, in sport or through mere wantonness, pointed a pistol at the deceased, having some reason to think that it was not loaded; and the deceased, apparently in fear, said, "Look out how you handle that revolver around here; you have got your finger on the trigger"; and the defendant replied, "I know it, and I will show you how it works." He thereupon pulled the trigger, and a shot followed which killed the deceased. On his trial the jury found defendant guilty of manslaughter. Held, That under these circumstances, a sentence of seven years in the penitentiary was excessive, and that the sentence should be reduced to four years.

ERROR to the district court for Cherry county: JAMES J. HARRINGTON, JUDGE. *Affirmed. Sentenced reduced.*

*Allen G. Fisher and John M. Tucker, for plaintiff in error.*

*Frank N. Prout, Attorney General, and Norris Brown, contra.*

BARNES, J.

The state prosecuted Soney Ford in the district court for Cherry county for killing one Allen Rothchilds. The information charged him with murder in the first degree, and the jury found him guilty of manslaughter. The trial judge sentenced him to imprisonment in the penitentiary for the period of 7 years. To reverse this sentence he brings error, and will be called the plaintiff.

1. It is contended that the evidence does not sustain the verdict, and the special reason given for this contention is that it was not shown that the killing was done while the plaintiff was in the commission of an unlawful act. The facts, as shown by the record, are substantially as follows: The plaintiff is a colored man who had been a soldier in the regular army and was discharged while his command was at Fort Niobrara, near the village of Valentine, in Cherry county, Nebraska. After his discharge, he was employed in driving a team with which he carried passengers to and fro between the village of Valentine and the Fort. On the evening of December 24, 1902, at about 9 o'clock, the plaintiff started from Valentine to the Fort with 4 or 5 passengers, and on the way they concluded to stop at what is commonly known as the "Hog Ranch," a vile resort for men and women, situated near the Post. When they arrived at this resort, they tied the team and went into that part of the ranch called the dance hall. They found several persons there, both men and women, all colored; and after warming themselves at the stove the plaintiff danced a couple of times; after the dance was over, he went up to the platform that the piano stood on, and where Rothchilds sat, having the pistol with

which the shooting was done in his hand. He flourished it around, and the deceased said to him, "You should mind how you handle a gun around here; you have got your finger on the trigger"; and the plaintiff said, "I know I have, but I want to show you how it works." The pistol was pointed directly at Rothchilds' face, and was, at that instant, discharged; deceased fell from the piano stool where he was sitting, and the plaintiff ran up and tried to help him up; threw the revolver on the floor, and said to the bystanders, "Don't hurt me, I didn't mean to shoot him."

There was no evidence showing, or tending to show, any ill feeling between Rothchilds and the plaintiff, and no motive was shown for the killing. Of course there is some dispute in the testimony over minor particulars, but the foregoing fairly states the situation, and what occurred at the time the fatal shot was fired. It is evident from the record and the verdict that the jury acquitted the plaintiff of murder in the first degree and murder in the second degree, finding that there was no premeditation or deliberation, and that the shooting was done without malice; but did find that the killing was done unintentionally while the plaintiff was in the commission of an unlawful act. We think that the evidence fully sustains this verdict. The pointing of the revolver at the deceased and the pulling of the trigger, under the circumstances, was an unlawful act.

The pointing of a loaded revolver at another, if within range, is an assault, and the same is true if it is not loaded, if the person aimed at is not aware of the fact. *Maxwell, Criminal Procedure* (2d ed.), 81; *Beach v. Hancock*, 27 N. H. 223. As already indicated, to point a gun or pistol at a person who does not know but that it is loaded, and has no reason to believe that it is not, is an assault. 1 *McClain, Criminal Law*, sec. 233; *State v. Shepard*, 10 Ia. 126; *State v. Triplett*, 52 Kan. 678. In the case of *State v. Shepard, supra*, the defendant was indicted for an assault with a gun with intent to commit murder, but was



convicted of an assault only. At the close of the testimony the defendant requested the court to instruct the jury: "First, that they must find that the gun with which the alleged assault was committed, was loaded and in a condition to be fired off, or the presentation of it was no assault; second, that if they found the gun was not loaded, they would find the defendant not guilty; third, that if they did not find an intent to kill, they should find the defendant not guilty." The refusal to give these instructions was assigned as error. The court said:

"We do not think the court erred. Mr. Greenleaf (vol. 1, sec. 59) states that the presenting a gun or pistol at a person is an assault. But he adds, that 'whether it be an assault to present a gun or pistol, not loaded, but doing it in a manner to terrify the person aimed at, is a point upon which learned judges have differed in opinion.' \* \* \* After viewing the question in its various lights, we are inclined to hold with those who regard it as an assault, where the person aimed at does not know but that the gun is loaded, or has no reason to believe that it is not." In *State v. Triplett*, *supra*, it was held:

"A person may be guilty of an assault upon another with a pistol without firing it at all, and if he does fire it, without intending at the moment of firing to hit the person upon whom he is charged with committing the offense, when the attitude or action of a party is threatening towards another, and the effect is to terrify, the offense of assault is complete. \* \* \* The state interferes with and punishes evil conduct whenever, among other reasons, it tends to public disturbance or breaches of the peace, creates disquiet in the community, or inflicts on the individual a wrong entitling him to governmental protection."

The testimony discloses that when the plaintiff pointed the revolver at Rothchilds he put him in fear. The remark made by the deceased shows that he feared injury, therefore the assault, even without the firing of the pistol, was complete. And so it may be said with absolute certainty

that at the time the fatal shot was fired, although it was done unintentionally, the plaintiff was in the commission of an unlawful act.

2. It is further contended that the court erred in refusing to give the jury the following instruction requested by the plaintiff.

"You are instructed by the court that, if you are not convinced beyond a reasonable doubt by the evidence that the defendant discharged the pistol intentionally, and knew or had reason to believe it was then loaded, but on the contrary the evidence undisputed tends to the belief that it was accidental, and not done with any intent or desire to injure Rothchilds, you should acquit the defendant."

This instruction is so faulty that the court was justified in refusing to give it. As we have seen, the evidence was amply sufficient to convict the plaintiff of the crime of manslaughter, and the mere fact that the shooting was accidental, and not done with intent or desire to injure the deceased, did not entitle the plaintiff to an acquittal. At the time the fatal shot was fired, although the plaintiff had no intention or desire to injure the deceased, and although the shot was accidental, yet he was in the commission of an unlawful act, and the result of the shooting, together with this fact, clearly rendered him guilty of the crime of manslaughter. We hold, therefore, that the court did not err in refusing to give this instruction.

3. It is also contended that the plaintiff was entitled to have his theory of the case submitted to the jury. It is a sufficient answer to this contention to say that, by the plaintiff's own theory, coupled with the undisputed facts, he was guilty of the crime of manslaughter, and, the jury having found him not guilty of a greater offense, the failure of the court to give any other or more specific instruction relating to his theory in no manner prejudiced his rights.

4. Lastly, it is contended that the court erred in refusing to consider plaintiff's supplemental motion for a new trial, filed on the 9th day of February, 1904. The par-

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Ford v. State.

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ticular grounds of this motion are alleged to be newly discovered evidence material for the defendant, which could not, with reasonable diligence, have been discovered and produced at the trial, or within 3 days after the verdict was rendered; and such alleged newly discovered evidence is presented with the motion in the form of an affidavit. This affidavit is made by one Arthur N. Compton, one of the surgeons who attended the deceased from the day he was shot to the time of his death. The substance of the affidavit is that the doctor, during a professional visit to the deceased, asked him how the shooting occurred, and what caused it, and that the deceased answered as follows: "Ford did not intend to shoot me, it was an accident," or words to that effect. Even if this evidence were true and should be so accepted by the jury, still the plaintiff, under the circumstances, would be guilty of the crime of manslaughter. Again, the evidence was merely cumulative, and its effect would only strengthen the other evidence given on the trial, and which tended to show that the shooting was accidental. Indeed, the jury must have found that the shooting was unintentional, otherwise it would have found the defendant guilty of either murder in the first or second degree. Again, the affidavit and motion have not been preserved and brought here in the form of a bill of exceptions, and therefore we must refuse to consider it. For these reasons, we can not say that the trial court erred in refusing to consider the supplemental motion and grant a new trial thereon.

A careful examination of the evidence convinces us that the jury arrived at a correct verdict. It is apparent that the plaintiff was not actuated by any motive of hatred or revenge in his actions toward the deceased. It rather appears that he was having a good time just before the shooting occurred; that he had danced a couple of times with the women; that he had given an exhibition of what is called the "Buck and Wing" dance, and in fact was cutting quite a wide swath, to use a common expression; that while showing off, so to speak, he drew the pistol, which he had

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Chicago, B. & Q. R. Co. v. Jamison.

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some reason to suppose was not loaded, and with his finger on the trigger pointed it at Rothchilds; deceased was frightened, and told him to look out how he handled the pistol around there, that he had his finger on the trigger, and the plaintiff replied that he knew it, and he wanted to show him how it worked; that he pulled the trigger with the pistol pointed directly at the face of his victim, and the shot which followed was as much a surprise to the plaintiff as to any one. In this view of the case he was technically guilty of the crime of manslaughter, and while he ought to receive a reasonable amount of punishment for his criminal carelessness, and his uncalled for and unlawful act, yet it is our opinion that the sentence imposed by the trial court is too severe. The fact that plaintiff has been convicted of a crime does not authorize the courts to deprive him of those rights which the law still recognizes, nor treat him as having no rights. Our constitution provides: "Excessive bail shall not be required; nor excessive fines imposed; nor cruel and unusual punishments inflicted." We think that a sentence of 7 years in the penitentiary, under all the circumstances, may fairly be said to be a cruel punishment, and under the power given us by section 509a of the code of criminal procedure we will reduce the sentence 3 years. The judgment of the trial court is reduced to imprisonment for 4 years and, as thus modified, is affirmed.

JUDGMENT ACCORDINGLY.

HOLCOMB, C. J., concurs. SEDGWICK, J., absent and not sitting.

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CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY v.  
JOSEPH H. JAMISON.

FILED MARCH 2, 1904. No. 13,371.

Instruction. An instruction which is applicable neither to the issues nor to the evidence is prejudicially erroneous.

ERROR to the district court for Hall county: JOHN R. THOMPSON, JUDGE. *Reversed.*

*J. W. Deweese, F. E. Bishop and O. A. Abbott, for plaintiff in error.*

*W. H. Thompson, contra.*

AMES, C.

The defendant in error recovered a judgment in the district court in an action for damages for personal injuries. There was a general verdict accompanied by a series of special findings. The latter will be mentioned as occasion requires in the following discussion. The evidence is not appreciably contradictory, though contrary inferences, in some respects, are drawn from it by counsel.

There were two gangs of about 17 men each employed by the company and engaged in loading railway rails upon flat-cars. The rails were strung along beside the track, whence they had been removed and replaced by new rails, and the men were in charge of a foreman named McCarty. The cars were moved over and along the track by means of a locomotive as fast as the loading progressed. The rails weighed 560 pounds each, and it was customary to employ 16 or 17 men to take them from the ground and put them on the car, so that if each bore a proportionate share of the burden he would lift from 33 to 35 pounds. On the occasion in question 12 men were engaged, and each was required to lift approximately 47 pounds. In order that the men should successfully accomplish their task, it was indispensable that they should all exert themselves in the same manner simultaneously, that is, that certain prearranged movements should be made by all at the same time and, in order to effect this purpose, it was necessary that the series of movements should be made in a certain order of succession and in response to a pre-established code of signals. This series of signals and movements can not be better illustrated than by reciting

what was done in the instance in question, which was in the ordinary and usual manner of performing the task. The rail was lying easterly and westerly on the ground about two feet from the car, which was standing on the track north from it. The 12 men stood along the south side of the rail so that, ordinarily, their noses were, or should have been, about two and a half feet apart, the distances between their bodies being, of course, considerably less and varying with their sizes. A man named Sullivan stood at the east end of the rail, and the defendant in error Jamison at the west end of it. Sullivan having first indicated on what part of the car the rail was to be deposited, exclaimed, "We will give it to you," and simultaneously he and the men standing near him grasped the rail at and near its east end and raised it as far as his knees. This was a signal for all the men to take hold and raise the burden to a height even with the top of the car. Sullivan then gave the signal "up high," which was a signal that the rail should be lifted to a position about even with the shoulders of the laborers and resting upon their upturned palms, their faces, of course, being turned toward the car. When this position had been reached, Sullivan exclaimed "heave 'er," and the men, by a simultaneous impulse, threw the rail forward so that it alighted at the indicated place on the car. Sullivan and Jamison were both experienced and competent men and, for aught that appears, all the other men also were. But, on the morning of the day upon which this accident occurred, McCarty, the foreman, described to the men the nature of the service in which they were about to be engaged, and the code of signals and responsive movements to be observed, and cautioned them that they must avoid grasping the rail on the side of it toward the car, because of the danger of getting hurt by so doing, and personally and particularly cautioned Jamison in this respect, as did also one McIntyre, a fellow workman of the latter. On the occasion of the accident in question, which occurred at about 3 o'clock P. M., after the men had been engaged in this employment all the earlier

part of the day, Jamison, instead of standing on the south side of the rail and taking hold of it in the same manner as his fellows did, stood at the west end and grasped it with both hands, one on each side. What immediately followed, aside from the crushing of the fingers of Jamison's right hand so as to necessitate amputation, is a matter of inference and can not be made out with certainty. Nobody but himself knew of the fact until after the operation of loading had been completed, and the car and men had moved eastward into position for loading another rail.

The petition of the plaintiff in the district court alleges three acts of negligence on the part of the company, to one or all of which he attributes the injury. The answer, besides a general denial, pleads contributory negligence.

First, it is alleged, and the jury found that, at the time of the accident and during the progress of the operation of loading, the car begun slowly moving eastward and away from the plaintiff. This finding rests upon very slight evidence, and it is not shown how, if it be true, the fact contributed to the injury. The plaintiff himself says that it could have done so only by influencing the men to go through the movements more rapidly, and to throw the rail upon the car sooner than they would otherwise have done. But neither the plaintiff nor anyone else testifies to their having been so influenced. We think the finding immaterial.

Secondly, it is alleged that there was an insufficient number of men engaged in the work. The plaintiff testified and the jury found, that only 12 men joined in the loading of the rail, all the other witnesses, 3 in number, testified that there were 17. But that the force was insufficient the jury did not find, and that it was not so may be inferred from the fact that the identical force had been employed in the same operation during the preceding portion of the day without mishap or difficulty, and without objection. The plaintiff was a man 42 years of age, and had had years of experience in doing work of the same kind. If an insufficiency of force rendered the present

undertaking unnecessarily hazardous, he was fully aware of the fact, and according to a familiar rule of this court, by continuing in it, without objection, he assumed the extra risk himself. This finding is therefore immaterial.

Thirdly, it is alleged, and is found by the jury, that the signal to throw the rail upon the car was prematurely given before the west end was raised above the car. It is not specifically found to have been negligently so done, but there was a general verdict for the plaintiff, which this proceeding is prosecuted to review. This third finding, like the former, rests solely upon the testimony of the plaintiff and the following circumstances: The surface of the car was 4 feet above the track; the surface of the ground where the men stood was about even with that of the railway ties. The plaintiff, who is a man slightly under 6 feet in height, testified that the signal to throw was given when the rail was raised to a point about even with his hips, and that the east end, at that time, was probably 18 inches higher. He accounts for this circumstance by saying that an undue number of men were ranged near the east end. He is not corroborated in this respect, and it is not disputed that these men, except McCarty who was admittedly at his proper station at the east end, were fellow servants of the plaintiff, for whose fault in this regard the company would not be liable. The following instruction was excepted to and the giving of it is assigned for error:

"You are instructed that, when an employer places an employee under the direction and control of another and the latter in the exercise of the authority so conferred orders the former, with others, to do an act unusually dangerous, which they do, and thus exposes him to extraordinary peril, of the existence or extent of which he is not advised, the employer would be liable in the event of injury to such employee."

The instruction is obviously inapplicable both to the issues and to the evidence, and its submission to the jury was prejudicial error.



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Pitman v. Mann.

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It is recommended that the judgment of the district court be reversed and a new trial granted.

HASTINGS and OLDHAM, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, it is ordered that the judgment of the district court be reversed and a new trial granted.

REVERSED.

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BENJAMIN F. PITMAN, APPELLANT, v. WILLIAM MANN,  
APPELLEE.

FILED MARCH 2, 1904. No. 13,439.

**Mortgage Foreclosure: HOMESTEAD: FRAUD.** One of the most salutary rules of the law is that one shall not profit by his own wrong. A man who has fraudulently executed and put in currency a mortgage upon his homestead, without procuring his wife to join therein, can not, in an action to foreclose the instrument, after her death, gain any advantage by his own wrong, unless he can make it appear that such advantage will accrue, at least in part, to some one, other than himself, belonging to some of the classes of persons sought to be protected by the homestead act.

APPEAL from the district court for Dawes county: WILLIAM H. WESTOVER, JUDGE. *Reversed with directions.*

*Albert W. Crites, for appellant.*

*Michael F. Harrington, contra.*

AMES, C.

William Mann was born in Great Britain a subject of the English crown, as was also a woman who afterwards became his wife, and with whom, for a time, he cohabited as such in that country. There are two sons, fruit of the marriage. In 1876, both the sons had arrived at maturity

and had gone forth from the parental home seeking their own maintenance. In that year, Mann and his wife separated, and he came to the United States. She remained in England, and they have not since been reunited. Shortly after coming here, he entered a tract of government land lying in Dawson county, in this state, as a homestead, and subsequently, upon making final proof, described himself as a widower having two sons then living, and procured a patent of the land. The sons also came to this country, but have neither of them ever resided upon the premises. One of them, unmarried, entered a tract of land as his own homestead, and obtained a patent of it upon final proof. The other, who is married, has lived apart except that, together with his wife, he at one time made his father a visit of a few weeks' duration. Mann, after procuring his patent, obtained a loan of money, and executed a mortgage upon the land as security for the payment of a negotiable note. In his application for the loan, and in the mortgage, he described himself as a widower. The note came into the hands of the plaintiff as a *bona fide* holder, for value, before maturity. After the death of the wife, this action was begun to foreclose, and resulted in a judgment for the defendant, because of the fact that the instrument lacks the wife's signature. Whether the mortgage is void for that reason is the only question in this case. If so, the defendant is the only person who will profit by that fact. We think that under circumstances like the foregoing he is estopped to assert it. The statute avoiding a conveyance or incumbrance of the homestead of a married person, without the signature of both husband and wife, was enacted with the evident purpose of protecting both of the parties to the marriage, and those persons composing their families and dependent upon them. During the lifetime of any of such persons it may be that a husband or wife, who alone has executed such an instrument, may successfully defend against it without the concurrence of his or her consort or the dependents of either; and it may even be that such a defense would be entertained if made by a

sole survivor of the family, who had executed the instrument without fraud or concealment with respect to the homestead character of the lands, but neither of these questions is involved in this inquiry, or intended to be decided.

One of the most salutary rules of the law is that one shall not profit by his own wrong. If a man who has fraudulently executed and put in currency a mortgage upon his homestead, without procuring his wife to join in its execution, can, in an action to foreclose the instrument, gain advantage by his own fraud, it must be because such advantage will accrue, at least in part, to some one, other than himself, belonging to some of the classes of persons sought to be protected by the homestead act. Counsel have cited us no authority exactly in point, and we have been unable to find any, perhaps, because the circumstances of the case are in some respects singular. The opinion of the supreme court of Kansas in *Adams v. Gilbert*, 67 Kan. 273, appears to us, however, to rest upon very similar, if not identical principles, and it arrives at practically the same conclusion. In that case a deed of the homestead made by the husband, and void because of the nonjoinder of his wife, was upheld because, after her death, his conduct was such as to raise an equitable estoppel in favor of a mesne grantee. We think an estoppel arising before her death will attach with equal force after her decease.

It is recommended that the judgment of the district court be reversed and the cause remanded, with instructions to enter a decree as prayed in the petition.

HASTINGS and OLDHAM, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, it is ordered that the judgment of the district court be reversed and the cause remanded, with instructions to enter a decree as prayed in the petition.

JUDGMENT ACCORDINGLY,

## R. S. DICKENSON V. COLUMBUS STATE BANK.

FILED MARCH 2, 1904. No. 12,952.

1. **Pleadings: AMENDMENTS.** The allowance of amendments to an answer is not an abuse of discretion, even though a demurrer to the answer for lack of the supplied allegation has been overruled and objection made to the introduction of evidence, where opportunity is given the other party to produce additional proof, and no requirement of terms was asked for, and the amendments are as to material facts of which there is evidence.
2. **Evidence: COMPETENCY OF WITNESS.** Section 329 of the code allows evidence of an interested party against the representative of a deceased person, as to transactions with the deceased "in regard to the facts testified to" by the other party's witness, but no "further."
3. —: **PAYMENTS.** Where the party representing the deceased has introduced evidence of certain payments made to the other party, that party may show to what the payments were applied and that it was with the deceased's assent, but may not show a long antecedent agreement had with the deceased that the items, to which the payments were applied, should constitute a lien prior to a mortgage held by deceased upon the property out of which the payments came.
4. **Liens: PRIORITIES.** Advancements by a mortgagee made to harvest and market a crop of hemp, under an oral agreement with the owner and another mortgagee that they shall be repaid out of the proceeds of the crop before the mortgages, warrant the application of the proceeds to such payment as against a subsequent mortgagee with notice, who is also the assignee with notice of the other mortgage.
5. **Error: REVIEW.** "Error in the assessment of the amount due will not be reviewed under an assignment in the motion for a new trial that the verdict is not sustained by sufficient evidence." *Hammond v. Edwards*, 56 Neb. 631.
6. **Finding: EVIDENCE.** Evidence held to sustain trial court's finding of amount due.

ERROR to the district court for Platte county: JAMES A. GRIMISON, JUDGE. *Affirmed.*

*Reeder & Hobart*, for plaintiff in error.

*A. M. Post and Whitmoyer & Gondring*, contra.

**HASTINGS, C.**

Three errors are relied on by plaintiff in error in this action, who brought it in the trial court for an accounting for property on which he claimed a chattel mortgage lien. The accounting was had, but it was against plaintiff in the sum of \$1,148.77. The essential question in the case is, whether certain advancements, made by the defendant, as is claimed, to preserve and harvest the crop of hemp which was the subject of the liens, shall be satisfied out of the hemp before plaintiff's mortgages, or shall be postponed in favor of the latter. The trial court held that the advancements were to be first paid. Plaintiff brings error and complains: First, that the trial court was wrong in permitting an amendment of defendant's answer to be made after the evidence was all taken, setting up, in effect, that the advancements were made by agreement with the owner and with the assent of plaintiff's assignor, Murdock & Son. The claim is that there was not sufficient evidence of such facts to justify the amendment, and that such evidence of them as there was had been introduced over plaintiff's objection. The second complaint is that, as the disputed part of plaintiff's claim rests upon a lien assigned to him by the surviving member of the firm of Murdock & Son, the testimony of defendant's president, who was also a stockholder, to transactions with the deceased, Murdock, was improperly admitted. It is finally urged that the evidence is entirely insufficient to show any right to have these advancements preferred to plaintiff's lien.

Counsel say that they waive none of the errors complained of, but they consider them prejudicial because they are embraced in these three. So far as the amendment is concerned, if the facts in the case are such as to call for it, there seems to have been no abuse of discretion. It is true that it was made after the evidence to the court was taken, and it seems to have been made after objection, based on the absence of the allegations of assent by the other parties to these agreements, had been overruled. But, abundant

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opportunity was given to plaintiff to change his pleading or to put in additional evidence. The cause was continued, after the amendment, to the next term. An amendment to correspond with proofs was asked for by plaintiff and allowed to him. No attempt to add to evidence was made by the plaintiff, and no attempt to have terms fixed on which the amendment should be made. This objection should therefore only be considered in connection with the complaint as to the character of the proof.

Plaintiff objected to the evidence of defendant's president, Gerrard, as to transactions had with the deceased, Murdock, as being excluded by section 329 of the code. It was testimony of an interested party as to transactions with a deceased person against an assignee of the deceased. Unless testimony as to such transactions had been introduced by the other side it was inadmissible. There seems no doubt that Mr. Gerrard's interest as a stockholder of the bank is a "direct legal interest," and disqualified him under the terms of the statute. *Tecumseh Nat. Bank v. McGee*, 61 Neb. 709. It is claimed, however, that plaintiff had opened the door to Mr. Gerrard's testimony, by introducing his evidence as to a part of the transactions on his own behalf. Plaintiff had introduced Mr. Gerrard solely to testify as to receipts of money from the sale of this hemp. It was shipped by Mr. Jerome, the mortgagor. The drafts for it were remitted to Jerome, and by him were turned over to Mr. Gerrard. The deceased, J. S. Murdock, appears to have been a party to the application of \$400 from these payments to the mortgage held by his firm on the hemp. The facts of the payments being proved, it is claimed that this admits testimony that they were applied upon advancements made, subsequent to the mortgage, to harvest and market the crop, and that the advancements were, by agreement of defendant with Jerome and with Murdock & Son, to be repaid before anything was to be applied upon the mortgages of either party. The introduction of proof of these payments undoubtedly warranted proof by defendant that they were applied upon the ad-

vancements. We are entirely unable to see, however, how proof of the payments and of their application, could waive the bar of the statute as to testimony by defendant's president and stockholder, Gerrard, with regard to the entirely antecedent agreement, that the mortgages should be postponed to the advancements for harvesting and manufacturing the hemp to fit it for market. It seems clear that, in permitting testimony of this antecedent transaction with the deceased, the trial court was in error.

As before stated, the trial was to the court, and the admission of incompetent evidence will not require a reversal, if there is enough competent evidence to uphold the judgment. Leaving out entirely those portions of the evidence of Gerrard as to transactions with J. S. Murdock, which were not a part of these payments which plaintiff had proved, there is still uncontradicted evidence of an agreement to prefer the advancements. In the first place, there is the fact that out of the first car-load of hemp, the proceeds of which were turned over to defendant, \$512 were paid on these advancements of defendant, \$100 on one mortgage note of defendant, \$50 on another, and \$100 on a note of Murdock & Son. Gerrard's testimony, as well as all of the facts, show that this was by arrangement with J. S. Murdock, and as to this the evidence is competent. This was evidently a part of the transaction of payment. Plaintiff had shown defendant's receipt of the money, and defendant had shown its application. Plaintiff's own testimony shows that this payment and another of \$300 on the same note from the second car-load were both discussed by him with Murdock. The latter must have assented to defendant's application of the money from the first two car-loads of hemp sold. Mr. Jerome states that Murdock & Son were, at least, fully aware of the arrangement for advances from defendant to harvest the crop, and never objected. Mr. Gerrard states, and there is no denial, that H. I. Murdock, the survivor of the firm, was a party to the agreement. The trial court would not have been warranted in finding otherwise than that Murdock & Son were

parties to the agreement, that defendant should make these advancements and should be repaid for them in preference to the mortgages, its own and Murdock & Son's. It is clear that when plaintiff took his own mortgage on the tow, November 7, 1898, he knew of these advancements and knew, in part at least, what application had been made of the three car-loads of hemp which had been sold and the proceeds paid to defendant. He himself wrote the mortgage then made, and wrote the clause in it, "Subject to the claim of the Columbus State Bank." He admits knowing of the advancements when made, but denies knowledge of any agreement that they were to be a preferred lien on the hemp. It is clear, however, that he had ample knowledge to put him on inquiry, if not actual knowledge of the facts. It seems clear that the plaintiff is not entitled to claim any precedence over defendant's advancements by reason of the mortgage of November 7, 1898, when three of the five car-loads, the proceeds of which defendant received, had already been realized upon, and defendant's advancements were, most of them, more than a year old. It seems equally clear that the Murdock mortgage gives no such priority. It was bought by plaintiff with full knowledge of what defendant claimed, after plaintiff had examined notes and vouchers constituting defendant's claim. We have seen that there is no real doubt that Murdock & Son, while they held the mortgage, consented that it should be postponed to defendant's advancements. It is clear that defendant was entitled to apply the money it received to the payment of its advancements, and was entitled to satisfy the balance remaining due on its mortgages out of the property which plaintiff seized and shipped to New York.

So much of an opinion had been written and submitted as disposing of the case, when it was suggested that there was a complaint that the decree rendered was, in any event, excessive in amount. It was replied that the only claim of that kind was in the reply brief filed by plaintiff, in which was the statement that the decree for \$1,148.77 must be excessive, as the bank's mortgages were \$1,787.73,



advancements, including interest, were \$2,653.65, making a total of \$4,441.28; while payments aggregating \$4,242.22 were admitted, leaving a balance of only \$199.16, with interest, in any event. It was supposed that this discrepancy rested solely on the assumption that all of the defendant's evidence as to the application of these payments was incompetent, and therefore no showing as to the \$400, paid by defendant on the Murdock mortgage from proceeds of the tow, was to be considered as in the record. That contention of plaintiff having been overruled, it was supposed that the discrepancy between the claims of defendant, less the admitted payments and the amount of the decree, was removed. That there might be no injustice done, another hearing was ordered as to this question of the amount.

Two objections are now made to the amount of the judgment: First, that it appears that defendant's note of \$600, secured by mortgage bearing date August 24, 1897, was without consideration at the time it was given, and its real consideration was a part of the \$2,653.65 of advancements claimed, and its amount should be deducted from them; second, that the real amount of advancements shown by the record was only \$1,454.39, exclusive of interest. Both of these claims are entirely new ones, quite inconsistent with both the original and reply briefs of plaintiff in error. It is claimed that they should be considered now, as supporting the error assigned in the allegation that the findings of the trial court are not supported by the evidence. Defendant urges, on the other hand, that this new contention can not be considered under the assignment of error that the judgment is not sustained by sufficient evidence.

The decisions of this court seem to be clear that one who wishes to raise this question of error in the amount of recovery, must do so, in terms, in his motion for a new trial and in his petition in error. It is expressly made one of the grounds for a new trial in subdivision 5 of section 314 of the code. It is held that, to make it available in

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actions *ex contractu*, it must be expressly called to the trial court's attention. *Hammond v. Edwards*, 56 Neb. 631; *Riverside Coal Co. v. Holmes*, 36 Neb. 858; *Nyc & Schneider Co. v. Snyder*, 56 Neb. 754; *Wachsmuth v. Orient Ins. Co.*, 49 Neb. 590; *Montgomery v. Albion Bank*, 50 Neb. 652; *Bearers v. Missouri P. R. Co.*, 47 Neb. 761. We have, however, examined the record and, if the questions had been distinctly raised, there is evidence to sustain the trial court in its conclusion that the \$2,653.65 were all advanced, and that it was additional to the loans evidenced by the notes. Mr. Jerome, while his attention was not apparently explicitly directed to the question of whether the advancements claimed included any part of the consideration for the \$600 note, testifies that he received the consideration for the note and he received the advancements. It may be true that the statements made by the bank to Jerome, at the time, as to the application of the proceeds of the five cars of tow, are not alleged as accounts stated, and are perhaps not conclusive upon plaintiff, but they are certainly competent to refresh Mr. Gerrard's recollection, and he testifies that they represent the facts. Taking them as correct, and declining to assume, what nowhere appears from the evidence and is clearly contrary to these statements, that the \$600 note should be charged against the advancements, the decree does not vary from a careful recomputation more than a few dollars, not more than different methods of computing so complicated a transaction will account for.

It is recommended that the judgment of the trial court be affirmed.

AMES and OLDHAM, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the trial court is

**AFFIRMED.**

JOSEPHINE G. PERRINE V. KNIGHTS TEMPLAR'S AND MASONS'  
LIFE INDEMNITY COMPANY.\*

FILED MARCH 2, 1904. No. 13,400.

1. **Insurance Certificate: ACTION: VENUE.** An action upon a benefit certificate or insurance policy is transitory and not local in its nature, and may be brought in whatever state the company issuing the policy can be found, without any regard to where the contract of insurance was made or the subject thereof was located.
2. **Appearance.** The appearance of a defendant, for the sole purpose of objection by motion to the jurisdiction of the court over his person, is not an appearance to the action; but, where the motion also challenges the jurisdiction of the court over the subject matter of the controversy and is not well founded, it is a voluntary appearance equivalent to a service of summons.

ERROR to the district court for Jefferson county:  
CHARLES B. LETTON, JUDGE. *Reversed.*

*Clark Varnum and Montgomery & Hall*, for plaintiff in error.

*Lamb & Wurzburg and R. A. Clapp, contra.*

OLDHAM, C.

Plaintiff in this cause of action was the beneficiary named in a benefit certificate issued by the defendant, Knights Templar's and Masons' Life Indemnity Company, a mutual benefit association, organized and incorporated under the laws of the state of Illinois, and doing business throughout the several states of the Union. In 1900, the defendant, in compliance with the laws of this state governing mutual benefit associations, signed, sealed and delivered to John F. Cornell, auditor of the state of Nebraska, a power of attorney by which it constituted him, as auditor of the state, and his successors in office its attorney in fact, upon whom all lawful processes in any action or proceeding within the state of Nebraska might be

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\* Rehearing allowed. See opinion, p. 273, *post*.

served. Within six months after such power of attorney had been delivered to the auditor of Nebraska, the plaintiff instituted this suit in the district court for Jefferson county, Nebraska, by filing her petition, in which she alleged that defendant was indebted to her on her benefit certificate in the sum of \$850. On the 3d day of August, 1900, summons was issued on this petition and delivered to the sheriff of Lancaster county, and service of summons was accepted by John F. Cornell as auditor of the state. When this summons was returned, objection to the jurisdiction of the court over the person of defendant was filed and sustained by the district court. An alias summons was thereupon issued and directed to the sheriff of Jefferson county, and service thereon was attempted to be had upon Charles Weston, successor of John F. Cornell, as auditor of the state. This service, on objection, was likewise quashed and plaintiff, by order of the court, was awarded a second alias summons. The second alias summons was accordingly issued and placed in the hands of the sheriff of Jefferson county, and service of the same was made by the sheriff of said county upon Charles Weston, auditor, in the county of Jefferson, on the 21st day of November, 1901. On the 23d day of December, 1901, defendant filed the following objections to the jurisdiction of the district court for Jefferson county:

"Comes now specially the above named defendant, for the sole purpose of objecting to the jurisdiction of the court and for no other purpose, and submits the court is without jurisdiction of the subject matter or of the person of the defendant, for the following reasons: (1) That there has been no service of summons herein. (2) That there has been no legal service of summons herein. (3) That the pretended service is under an alias summons issued without authority, and without a precipé having been first filed therefor. (4) That the defendant was never found nor served with summons in said county, and never could have been found and served with summons in said county. (5) That the defendant is a foreign cooperative

and mutual insurance company, doing business in the state of Nebraska only by virtue of license issued to it by said state as such corporation, and neither the alleged cause of action, nor any part thereof, arose in Jefferson county or in the state of Nebraska, and the plaintiff is not now, nor ever has been, a resident or citizen of the state of Nebraska. (6) That, at the time of the filing of the petition in the above entitled cause, under which jurisdiction is claimed to have been obtained, defendant had neither property in nor debts owing to it in said Jefferson county, neither had it an agent in said Jefferson county, nor could it be summoned therein. (7) That the said petition herein, under which the second alias summons was issued, was filed on the 3d day of August, 1900, and summons issued thereon without a then present ability to serve the same upon the defendant, or its alleged agent or attorney, in said Jefferson county, Nebraska; that the said second alias summons, under which service is alleged to have been made, was issued more than one year after the filing of said petition under which it was issued, and after the court had twice sustained objections to its jurisdiction for the reason that, at the time the petition was filed and the cause commenced, no service of summons could be had upon the defendant in said Jefferson county. (8) No service of summons upon the auditor of the state of Nebraska in his official capacity can be made beyond the boundaries of said Lancaster county in said state, his official residence, and that no service of summons herein could be made upon the said auditor. (9) That no service could be had herein upon Charles Weston, auditor of public accounts, in said Jefferson county, or elsewhere. (10) That the alleged service of summons upon the said Charles Weston was and is void."

Affidavits in support of and counter affidavits were filed to these objections, and on the hearing thereof the court rendered the following order and judgment:

"Now on this 16th day of May, 1903, this cause came on to be heard upon the defendant's objections to the juris-

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diction of this court; upon due consideration whereof the court doth sustain the objections of defendant as to jurisdiction. To which ruling of the court the plaintiff then and there duly excepts, and forty days from the rising of the court is given to plaintiff to prepare and present her bill of exceptions. And, thereupon, the following order was made by the court, to wit: 'This cause is hereby dismissed at plaintiff's costs.'

To reverse this judgment, the plaintiff brings error to this court.

We are first asked to examine into the holdings of the court on the return of each of the summonses, the service of which were quashed by the order of the district court. This, however, we can not do in view of the fact that no final judgment was entered by the court when service was quashed on either of the former summonses, and plaintiff acquiesced in each of these orders by applying for and receiving leave from the court to issue its alias summons; so that our investigation will be limited to the action of the court in sustaining the objections to jurisdiction at its last hearing.

There are three special requisites of jurisdiction of courts in personal actions: The first of these is, jurisdiction of the person of the plaintiff; second, jurisdiction of the person of the defendant; and, third, jurisdiction of the subject matter of the action. As to the first requisite, the court was fully invested with it by the action of plaintiff herself in filing her petition and executing an undertaking for costs. Concerning the third requisite, the district court being a court of general common law jurisdiction was invested with jurisdiction of the subject matter of the controversy, if the action were personal and transitory in its nature. The fact that the cause of action was against a foreign insurance or beneficiary company and the beneficiary did not reside in the state, and that the contract was entered into in another state, would not oust the jurisdiction of the district court of this state of the subject matter of the controversy, if the defendant were found

within the state. The authorities all seem to agree that an action upon a benefit certificate or insurance policy is transitory and not local in its nature, and may be brought in whatever state the company issuing the policy can be found, without any regard to where the contract of insurance was made or the subject thereof was located. *Mohr & Mohr Distilling Co. v. Insurance Cos.*, 12 Fed. 474; *Northwestern Mutual Life Ins. Co. v. Lowry*, 20 S. W. (Ky.) 607; *Johnston v. Trade Ins. Co.*, 132 Mass. 432. And the same principle applies to actions on policies of fire insurance. *Insurance Co. of North America v. McLimans & Coyle*, 28 Neb. 653. It is therefore apparent that the district court for Jefferson county had jurisdiction both of plaintiff and of the subject matter of the controversy; and it also follows that, if either by proper service of process or by the voluntary appearance of the defendant in that court, it acquired jurisdiction of the person of the defendant, then defendant's objections should have been overruled.

It is obvious, from an examination of the objections filed, that defendant intended by its special plea to challenge the jurisdiction of the court, not only over the person of defendant, but also over the subject matter of the controversy. The question then arises, can a defendant, without entering a general appearance, challenge the jurisdiction of a court over the subject matter of a controversy there pending? The question of a right to challenge jurisdiction without an appearance has been before this court on numerous occasions, and the rule announced by LAKE, C. J., in the early case of *Crowell v. Galloway*, 3 Neb. 215, has always received our commendation. In that case the learned chief justice said:

"It is a general, and we think a wholesome rule of practice, that if a defendant intend to rely upon the want of personal jurisdiction as a defense to a judgment, he must either make no appearance, or if at all, for the single purpose of questioning the right of the court to proceed; and if he do more than this, and appear for any other purpose

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at any stage of the proceedings, he shall be held thereby to have waived all defects in the original process, and to have given the court complete jurisdiction over him for all the purposes of the action."

In *Elliott v. Lawhead*, 43 Ohio St. 171, defendant was served by publication, and filed a special appearance excepting to the service, and also challenging the jurisdiction of the court as to the subject matter of the controversy. In disposing of the case, Johnson, J., speaking for the court said:

"This motion assigns two reasons why it should be granted: First, want of legal and proper service; and, second, because the court had no jurisdiction of the subject matter. This last ground was in the nature of a demurrer to the jurisdiction of the court, and was in itself an appearance in the case. It amounted to a waiver of service, and gave the court jurisdiction over the person of defendant. It is true the defendant 'comes for the purpose of filing this motion and for no other purpose,' and had the motion been confined to want of proper service it would not have operated as an appearance. It was not so limited, but embraced an additional reason, to wit, the right of the court to hear and determine the subject matter. The rule is that where a defendant appears *solely* for the purpose of objecting to the jurisdiction of the court over the person, such motion is not a voluntary appearance of defendant which is equivalent to service. Where, however, the motion involves the merits of the case made in the petition, the rule is otherwise. *Handy v. Insurance Co.*, 37 Ohio St. 366; *Maholm v. Marshall*, 29 Ohio St. 611."

We therefore conclude that, by challenging the jurisdiction of the court over the subject matter of the controversy, the defendant entered a general appearance, and this being true, it is immaterial whether the service of summons upon the defendant, or rather upon its alleged attorney in fact, the auditor of this state, was properly or improperly made.



We therefore recommend that the judgment of the district court be reversed and the cause remanded for further proceedings.

AMES and HASTINGS, CC., concur.

By the Court: For the reasons given in the foregoing opinion, it is ordered that the judgment of the district court be reversed and the cause remanded for further proceedings.

REVERSED.

The following opinion on rehearing was filed December 7, 1904. *Judgment of reversal adhered to:*

**Appearance: JURISDICTION.** An appearance for the purpose of objecting to the jurisdiction of the court of the subject matter of the action, whether by motion or formal pleading, is a waiver of all objections to the jurisdiction of the court over the person of defendant, whether the defendant intended such waiver or not.

OLDHAM, C.

This is a rehearing. The former opinion is found, *ante*, p. 267. The case is fully stated in that opinion. It is now urged that the objections raised by the defendant in error in the court below were to the jurisdiction of the court over the person of the defendant, and nothing more, because the grounds assigned relate alone to the jurisdiction of the person. The pleading filed in the court below states, "Comes now specially above named defendant for the sole purpose of objecting to the jurisdiction of the court, and for no other purpose, and submits that the court is without jurisdiction of the subject matter or of the person of the defendant for the following reasons"; whereupon the reasons are set forth, ten in number. We are now urged to disregard the challenge therein made to the jurisdiction of the subject matter and treat it as surplusage. Our duty in this matter depends upon whether or not, under the "reasons assigned," there could have been anything considered by the court except the sole

question of jurisdiction over the person of the defendant; not upon what was considered, but what might have been properly considered and determined by the court. We have taken our code from Ohio, and the practice of that state is analogous to ours. In *Smith v. Hoover*, 39 Ohio St. 249, the court said:

"The appearance of a defendant in court for the sole purpose of objecting, by motion, to the mode or manner in which it is claimed that jurisdiction over his person has been acquired, is not an appearance in the cause, or a waiver of any defect in the manner of acquiring such jurisdiction; while, on the other hand, the appearance for the purpose of contesting the merits of the cause, whether by motion or formal pleading, is a waiver of all objections to the jurisdiction of the court over the person of defendant, whether the defendant intended such waiver or not. In respect to this question, an important distinction is made between an objection to the jurisdiction of the subject matter of the suit, and of the person of defendant, although complete jurisdiction in the court to hear and determine the action is not acquired unless the court has jurisdiction over both the subject matter and the person. An objection to jurisdiction over the subject matter is a waiver of objection to the jurisdiction of the person, while an objection to the jurisdiction of the person is a waiver of nothing."

With these considerations in view we turn to the "reasons assigned":

"5. That the defendant is a foreign cooperative and mutual insurance company doing business in the state of Nebraska only by virtue of a license issued to it by said state as such corporation, and neither the alleged cause of action, nor any part thereof, arose in Jefferson county or in the state of Nebraska, and the plaintiff is not now, and never has been, a resident or citizen of the state of Nebraska.

"7. That the said petition herein, under which the second alias summons was issued, was filed on the third

day of August, 1900, and summons issued thereon without a then present ability to serve the same upon the defendant, or its alleged agent or attorney, in said Jefferson county, Nebraska: that the said second alias summons under which service is alleged to have been had was issued more than one year after the filing of said petition under which it was issued, and after the court had twice sustained objections to its jurisdiction for the reason that, at the time the petition was filed and the cause commenced, no service of summons could be had upon the defendant in said Jefferson county."

The 5th objection challenges the right of the plaintiff to bring and maintain the action in Jefferson county. This raises the legal question whether or not the alleged cause of action set forth in the petition was local or transitory. The challenge was made to the court by apt language in the formal part of the instrument and in the reasons assigned, and is a jurisdictional question, not of the person, but of the subject matter of the action. And when followed by an exhaustive showing on this point, as was done, of the truth of these allegations, we can come to but one conclusion, and that is, it was the intention of the pleader to challenge the jurisdiction of the court over the subject matter, and that he has done so both by his averments and by the evidence. And again, the 7th assignment, if it means anything, is a plea of *res judicata* of the matters then pending before the court. It would be difficult to understand how the language of this assignment could be used for the sole purpose of challenging the jurisdiction of the court over the person of the defendant. That, to avoid an appearance, the objections must be confined to this purpose has been the holding of this court from its organization.

We therefore conclude that our former opinion is sound in principle and should be adhered to, and we so recommend.

AMES, C., concurs. LETTON, C., not sitting.

By the Court: For the reasons stated in the foregoing opinion, the former opinion is adhered to.

REVERSED.

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WILLIAM VON DOHREN V. JOHN DEERE PLOW COMPANY.

FILED MARCH 2, 1904. No. 13,304.

1. **Sale: IMPLIED WARRANTY.** The law is well settled that the purchaser of personal property, under an implied warranty that the same is well made and reasonably suitable for the purposes for which it is purchased, has a reasonable time within which to test the same to determine whether or not it is as warranted, and such question is ordinarily one for the jury.
2. **Contract: RESCISSION.** After he has made the test, and has discovered all of the defects which he claims exist, and calls the attention of the seller thereto, and the seller refuses to make any changes but insists that the article is as represented, the purchaser must at once return it, or his right to do so will be lost.
3. ———: **AFFIRMANCE.** In such case, where the property is a corn sheller, purchased for custom work, and the purchaser continues to use the machine, after such refusal by the seller, for a day and a half, and until he has finished all the work he has on hand, and then keeps the machine in his shed for twenty-four days before offering to return it, it will be *held*, as a matter of law, that he has elected to affirm the contract as made.

ERROR to the district court for Douglas county: LEE S. ESTELLE, JUDGE. *Affirmed.*

*John T. Cathers and J. O. Detweiler, for plaintiff in error.*

*F. A. Brogan, contra.*

FAWCETT, C.

Defendant in error, hereinafter styled plaintiff, brought this action in the court below to recover from plaintiff in error, hereinafter styled defendant, the value of a corn sheller, which plaintiff alleges it sold and delivered to

defendant on June 13, 1901, for an agreed price of \$487.18.

For answer, defendant admits that he ordered the sheller, admits that he refused to pay plaintiff therefor, and denies each and every other allegation contained in the petition.

For further answer, defendant alleges that he is a dealer in agricultural implements and purchased the sheller for one Fred H. Voss, to whom the said machine was delivered by plaintiff, on his order; that the machine was defective in several respects set out in the answer; that it would not do the work for which it was intended, in a satisfactory manner; that the machine was purchased from plaintiff under an implied warranty that it was a new machine, and a machine reasonably suitable and fit for the purpose for which it was intended and ordered, and that it would do the work for which it was intended to be used, in a reasonable, proper and suitable manner. For reply, plaintiff admits that it sold the machine to defendant on an implied warranty, as alleged, but denies each and every other allegation in defendant's answer, except such as are contained in plaintiff's petition.

The evidence shows that Voss took the machine to his home, near Millard, in Douglas county, and on June 13, 1901, set the same up for work and shelled corn with it that day. The machine not operating to Voss' satisfaction, he reported the matter to defendant who, in turn, reported it to plaintiff. That plaintiff's expert, one R. J. Teare, went to Millard a few days thereafter to inspect the machine, but Voss was not shelling that day, so it was agreed that he, Teare, should return again on June 25. On the 25th of June, Voss started to shell corn at the farm of John Seibord, about 6 o'clock in the morning, and continued to shell at that place until 6 in the evening. Mr. Teare appeared on the scene about 11 o'clock in the forenoon and inspected the machine, watching its operations until they quit for dinner. After dinner he again went out and watched the working of the machine for about three-quarters of an hour. He testifies that during all

the time he was there the machine was running perfectly and doing its work well in all respects; that Voss called his attention to the matters he was complaining about and wanted him to make several changes in the machine; that he refused to make any of the changes or do anything about the matter, except to give Voss an order on the defendant for the material for rebabbitting one of the boxes, which would cost about 40 or 50 cents, instructing defendant to charge the same to plaintiff; that Voss accepted the order and said he would have it done. He testifies, positively, that he then and there refused to make any of the other changes or betterments which Voss called for. This testimony is corroborated by the cross-examination of Voss, himself, as appears on page 55 of the bill of exceptions.

After this interview, Teare left the place and returned to his home in Omaha. Voss continued to run the sheller all that afternoon until 6 o'clock, at which time he finished the job of shelling he had for John Seibord. He then moved his machine to the farm of Henry Reimer, where he shelled something over 200 bushels of corn, after supper that evening. The next day, June 26, he moved the machine to Charles Seibord's, where he ran it all day and until he had finished the shelling at that place. Having finished all the work he had on hand, he then hauled the machine home, put it in his shed and permitted it to remain there from that time, June 26, until July 20, when he hauled it to plaintiff's place of business in Omaha, and demanded a rescission of his contract. Plaintiff refused to receive the machine, so Voss left it on one of the public streets of Omaha, near plaintiff's place of business, and went away. The machine has remained there until this time.

After both sides had rested, plaintiff moved the court to direct a verdict in favor of the plaintiff for the amount of its claim. The court overruled the motion, and submitted the case to the jury. After the jury had been out for some time, it returned and asked for further instruc-

tions, which the court gave, and, soon thereafter, the jury returned a verdict in favor of the plaintiff for the full amount claimed in its petition, with interest, upon which, after overruling defendant's motion for a new trial, the court entered judgment.

Numerous errors are assigned by defendant as to the giving and refusing of instructions, and particularly as to the giving of the instructions given by the court after the jury had once retired; and extended arguments are made in the briefs of the parties as to whether the contract was an executory or an executed contract. Under our view of the case, it is unnecessary to pass upon any of these questions. It is immaterial whether the contract is an executory or an executed contract, or whether the court correctly stated the law in its instructions or not, as, under the pleadings and evidence, there could not be any other result than the one which was reached. We think the court should have sustained plaintiff's motion to direct a verdict. The law is settled, beyond all question, that the purchaser of personal property like that in controversy, under an implied warranty, has a reasonable time to test the same to ascertain whether or not it is as warranted, and, ordinarily, this would be a question for the jury; but, after he has made the test, and has discovered all of the defects which he claims exist, and calls the attention of the seller to these defects, and the seller refuses to make any changes, but insists that the machine is as represented, the buyer must at once return the property. He can not keep it and use it for any length of time thereafter, and certainly he could not continue to use it until he had finished the work in hand, and then put it in his shed and keep it for nearly a month, and claim that he had acted with promptness or even within a reasonable time. When Teare told Voss, on the afternoon of the 26th of June, that he would not make any of the changes Voss demanded, and Voss continued to use the machine until he had finished all the work he had on hand, and then kept it for over three weeks in his shed before making any at-

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tempt to return it, he thereby ratified the contract as made.

We recommend that the judgment of the district court be affirmed.

**ALBERT and GLANVILLE, CC., concur.**

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is

**AFFIRMED.**

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**SIMPSON MCKIBBIN v. HENRY J. DAY ET AL.**

**FILED MARCH 2, 1904. No. 13,379.**

1. **Venue: SUMMONS TO ANOTHER COUNTY.** In a personal action for the recovery of money only, where a resident of the county where the action is brought is joined with a resident of another county, to authorize service upon the latter in the county of his residence there must be an actual right to recover against the defendants jointly.
2. **Jurisdiction: JOINT LIABILITY.** Where the allegations of the petition in a case of that character are such as to include both a joint and several liability against the defendant, the jurisdiction of the court as to the nonresident on his several liability, is sufficiently challenged by a plea to the jurisdiction, setting forth the fact of his residence in another county, and the service of process upon him therein, and upon the return of a verdict which negatives a joint liability, he is entitled to a dismissal.
3. **Parties: INSTRUCTION.** In an action for false and fraudulent representations in the sale of property, where a copartnership and the alleged members thereof are made defendants, and the relationship of the other defendants to such copartnership is put in issue, it is error for the court to instruct on the theory that the individual members of the copartnership are the only parties defendant.
4. **Sale: REPRESENTATIONS.** Ordinarily, where a vendee has an opportunity for inspection, representations by the vendor, as to the value of the property, are regarded as mere expressions of opinion, and afford no basis for an action of fraud and deceit.
5. ———: **FRAUD.** But where such representations are based on



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special knowledge of the vendor, which he obtained or pretends to have obtained, by handling the property or invoicing it, and are believed by the vendee, and acted upon by him to his injury, they amount to actionable fraud.

ERROR to the district court for Lancaster county: LINCOLN FROST, JUDGE. *Reversed.*

*A. E. Harvey and Stewart & Munger*, for plaintiff in error.

*L. C. Burr, contra.*

ALBERT, C.

Henry J. Day brought this action in the district court for Lancaster county against Simpson McKibbin, George J. McKibbin, John S. McKibbin and McKibbin Brothers, a copartnership. Service on all of the defendants save Simpson McKibbin was had in Lancaster county. Simpson McKibbin was a resident of Phelps county, and summons issued to that county for him and was served on him there.

The allegations of the petition are, in substance, as follows: That the defendant McKibbin Brothers is a copartnership composed of the other defendants herein. That, on a certain date, the plaintiff was the owner of certain real and personal property in Phelps county, and the defendants were the owners of a certain house and lot, stock of merchandise and store fixtures in the city of Lincoln. That, on said date, the defendants, with intent to cheat and defraud the plaintiff, and for the purpose of inducing him to exchange his said property in Phelps county for the property of the defendants, falsely and fraudulently represented to him that their said house was well built, in good repair, and would rent for \$50 a month, and that the said house and lot were worth the sum of \$8,000; that an invoice of the said stock of merchandise had been taken about four months before, that it invoiced \$6,700; that the stock had been increased since such in-

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voice, and said stock and fixtures were worth \$7,000; that said stock was new and well selected, and had not been in the store more than one year; that the business conducted with said stock and fixtures was prosperous, and that the daily sales thereof had averaged \$80 a day, as shown by the defendants' books.

The plaintiff alleges that he relied upon said representations, believed them to be true, and was thereby induced to make said exchange with the defendants. That the said representations were false, as the defendants well knew, in this: The said house was not well built, was not in good repair and would not rent for \$50 a month; that the said invoice of stock, taken by the defendants, did not show the value thereof to be \$6,700, and the said stock had not been increased since such invoice; that said stock was not new or well selected, but old and shop worn, and consisted of odds and ends of little value; that the business conducted with said stock and fixtures was not prosperous, and the daily sales thereof averaged much less than \$80 a day; that the said stock of goods and fixtures were not worth to exceed \$3,000, and the said house and lot were not worth to exceed \$4,000. The damages are laid at some \$6,000.

Simpson McKibbin, who, as we have seen, was not a resident of the county in which the action was brought and was not served with process there, filed a separate answer in which he interposed a plea to the jurisdiction of the court over his person, setting up the fact that he resided in Phelps county, was served with process in that county, was not a member of the firm of McKibbin Brothers and was not interested therein directly or indirectly. In his answer he admitted having made the trade set forth in the petition, but denied all the other allegations therein contained. The other defendants answered, denying all the allegations of the petition. A trial resulted in a verdict in favor of the plaintiff and against the defendant Simpson McKibbin, and in favor of George J. McKibbin and John S. McKibbin against the plaintiff. As to the co-

partnership, no verdict was returned. Simpson McKibbin, thereupon, again challenged the jurisdiction of the court and asked to be dismissed. His motion was overruled and judgment entered against him in favor of the plaintiff, and in favor of George J. McKibbin and John S. McKibbin against the plaintiff. From the judgment in favor of the plaintiff, Simpson McKibbin prosecutes error, and from the judgment in favor of George J. McKibbin and John S. McKibbin, the plaintiff brings error.

As to Simpson McKibbin, the principal question is that of the jurisdiction of the court to render judgment against him. The action is purely personal and for the recovery of money only, and does not fall within any exception to the general rule formulated in section 60 of the code, which requires actions to be brought in the county in which the defendant, or some one of the defendants, resides, or may be summoned. One of the latest cases construing that section is *Stull Bros. v. Powell*, 70 Neb. 152. In that case the authorities are collected and compared, and the conclusion deduced therefrom is that, to authorize summons to another county in personal actions for the recovery of money only, there must be an actual right to join the resident and nonresident defendants. In the body of the opinion it is said, in effect, that the right to maintain an action of that character against the nonresidents served in another county, would depend upon the plaintiff really having a right to recover from the resident defendants jointly with the others. That the plaintiff in this case did not "really" have such right seems to be established by the verdict of the jury.

But it is insisted that the petition not only shows a joint liability by reason of the partnership relations of the defendants, but also a joint liability independent of such relations, and that, while the defendant Simpson McKibbin in his plea to the jurisdiction denied that he was a member of the copartnership, he did not, in express terms, deny joint liability for the false and fraudulent representations. We do not think such denial was necessary. Under

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our rules of practice, the allegations of the petition are sufficient to sustain a judgment against any or all of the defendants, because a cause of action against each defendant, severally, is included in the allegations showing a joint liability. But it is only for the purposes of the joint liability that service of process on Simpson McKibbin in another county was authorized. Hence, when he alleged in his plea to the jurisdiction that he was a nonresident of the county where the action was brought, and, was not served with process therein, but was served in another county, he stated facts sufficient to defeat the jurisdiction of the court, so far as it was sought to obtain a judgment against him severally, and when it was established by the verdict of the jury that he was not liable jointly with his codefendants, or any of them, he was entitled to a dismissal. In *Penney v. Bryant*, 70 Neb. 127, this court held that, where a joint liability is asserted against several defendants in order to maintain an action against one or more of them in a county other than that where they reside or are found, the latter are not to be held upon a different or several liability, even though it be disclosed by the pleadings and proof.

As to the judgment in favor of the defendants George J. McKibbin and John S. McKibbin and against the plaintiff, we think it should also be reversed. In the statement of the issues to the jury, the court overlooked the fact that the firm of McKibbin Brothers, as such, was a party defendant, and whether the other defendants were members thereof was one of the issues in the case, and instructed on the theory that such other defendants were the only defendants. It is not difficult to see how this was prejudicial to the plaintiff. If, as alleged, the firm was a party to the transaction, each member thereof was liable because of that fact, whether he actually participated in said transaction or not. But as the issues were stated to the jury, it was necessary for the plaintiff to show that each defendant participated in the fraud, in order to hold him liable. The instructions would have warranted the

jury in finding in favor of some of the defendants, even though it were established that the firm was a party to the fraud, and the other defendants composed such partnership. It is obvious, we think, that the charge in that respect was erroneous. It was the duty of the court to instruct as to the issues, whether requested to do so or not. *Kyd v. Cook*, 56 Neb. 71; *Hanover Fire Ins. Co. v. Stoddard*, 52 Neb. 745; *Sandwich Mfg. Co. v. Shiley*, 15 Neb. 109. The jury made no finding as to the defendant firm. It is probable that, had the issues been properly stated to the jury, it might have been implied from the two verdicts in this case that they found in favor of the firm, but, as the cause was submitted, no such inference can be drawn, because there is nothing in the entire charge whereby the jury were instructed as to the authority of one partner to bind the firm, or as to the liability of each member for the act of every other member in respect to the partnership business.

As the case goes back for a new trial, another feature of the instructions should be noticed, and that is, the failure to distinguish between the representations in regard to the value of the house and lot and the amount for which said property would rent, and the other representations alleged to have been made by the defendants. The exchange was made, after the plaintiff had examined the property which the defendants gave him in exchange for his. He had equal opportunity with the defendants to ascertain the value of the house and lot, and the rental value thereof. Under such circumstances, their representations in that regard were mere expressions of opinion, and he would not be warranted in relying upon them. *Nostrum v. Halliday*, 39 Neb. 828; *McKnight v. Thompson*, 39 Neb. 752; *Crocker v. Manley*, 164 Ill. 282. Such expressions "are regarded as trade talk which every man of intelligence receives *cum grano salis*." *Gordon v. Butler*, 105 U. S. 553; *Mooney v. Miller*, 102 Mass. 217. As to the value of the stock of goods and fixtures, a different rule would apply, because the representations in regard to their

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value, according to the plaintiff's theory, appear to have been based on special knowledge of the defendants obtained by handling the goods and invoicing them. But, in its instructions to the jury, the court made no distinction between the representations made in respect to the value of the real estate or the amount for which it would rent, and the other representations of which plaintiff complained. There can be no doubt that this was error, and prejudicial to Simpson McKibbin. It will no doubt be avoided on another trial.

It is therefore recommended that the judgment in this case be reversed and the cause remanded for further proceedings according to law.

FAWCETT and GLANVILLE, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is reversed and the cause remanded for further proceedings according to law.

REVERSED.

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HOWARD H. BALDRIGE ET AL., APPELLEES, v. JOHN COFFMAN  
ET AL., APPELLEES, IMPEADED WITH JOHN R. CONKLIN,  
APPELLANT.

FILED MARCH 2, 1904. No. 13,276.

**Partition: STATEMENT OF ACCOUNT.** Where an action in partition involves an accounting of transactions between the parties extending over a long series of years, it is the duty of the trial court, by himself or a referee, to state the account, giving the items or classes of items and sums credited and charged to the respective parties, and the facts, in his opinion, affording a reason therefor, so that this court may form a judgment as to whether the conclusion reached is justified by the law and the evidence.

APPEAL from the district court for Lancaster county:  
LINCOLN FROST, JUDGE. *Affirmed in part.*

*Billingsley & Greene and R. H. Hagelin, for appellant.*

*Baldrige & De Bord and T. J. Doyle, contra.*

DUFFIE, C.

This is an action for partition. The real estate involved formerly belonged to Samuel Coffman and John R. Conklin. In 1884 these parties formed a partnership to own and operate a stock farm near Denton in Lancaster county, Nebraska, to buy, feed and sell cattle, hogs and horses. This partnership continued to transact business until some time in 1895, and no settlement of the partnership accounts was ever had between them. Conklin conveyed a one-half interest in the land to Mr. Baldrige, and Samuel Coffman conveyed a one-half interest to his son John Coffman. Baldrige, after obtaining his interest, conveyed one-half thereof to Mr. De Bord, and these parties brought this action to obtain partition of the land. One Thompson intervened, claiming a lien upon the land because of certain sales for delinquent taxes at which he was the purchaser. As his lien was established and allowed by the court, it will not be necessary to make any further reference thereto. Pending the suit Samuel Coffman died, and the case has been revived in the name of his heirs. These heirs claim that the land was part of the partnership assets of Coffman & Conklin, and that whatever interest Baldrige obtained by his deed from Conklin was subject to the payment of a debt of \$30,000 or more, due to Samuel Coffman from the partnership of Coffman & Conklin. On the other hand, John R. Conklin claims that the partnership of Coffman & Conklin is indebted to him in a sum aggregating something like \$40,000, that the land was part of the partnership assets and is subject to the payment of that claim. On the trial, the court found that the land was not partnership property but that Conklin and Coffman each owned an undivided one-half interest therein, and, in relation to the accounting asked for, the decree

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recites: "And the court finds against the said John R. Conklin and John Coffman, Mary Coffman, Blanche Coffman, Charles Coffman, Gertrude Caine, Annette Morris, Kate C. Hale, William Coffman, administrator of the estate of Samuel Coffman, deceased, Rollo Moore, T. J. Doyle, guardian *ad litem* of Rollo Moore, upon the several petitions for an accounting, and that there is not sufficient evidence before the court upon which to make the accounting asked for therein." And it was decreed that the petition of the parties for an accounting be dismissed, without prejudice to a new action. From this finding and decree John R. Conklin has appealed.

We are inclined to believe that the court erred in dismissing the parties from court without making an accounting, and, until the accounting is made and it is determined whether there is anything due from one partner to the other, it would be useless to determine the legal rights of the parties to the land in question. If there was not sufficient evidence before the trial court to enable it to state an account between the parties in a satisfactory manner, we are certainly in no position to review the case if, in fact, there is any question for us to review. In *Hanson v. Hanson*, 4 Neb. (Unof.) 880, we have said:

"When an action in partition involves an accounting of transactions between the parties extending over a long series of years, it is the duty of the trial court, by himself or a referee, to state the account, giving the items or classes of items and sums credited and charged to the respective parties, and the facts, in his opinion, affording a reason therefor, so that this court may form a judgment as to whether the conclusion reached is justified by the law and the evidence."

In this case the partnership continued in business for ten years or more, no settlement having been made during that time. Accounts aggregating nearly a half million dollars are involved. Without any finding by the court as to what should be allowed or disallowed, with no opportunity for attorneys to point out errors made by the trial



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court in allowing or disallowing one or several items on one side or the other of the account, with a distinct refusal of the court to pass upon the question at all because of the unsatisfactory state of the evidence, we are asked to take up the case and try it as an original action. This we can not consent to do. We have none too much time to devote to specific errors pointed out by parties who feel themselves aggrieved by the rulings of the district court when such rulings are made and, as in the *Hanson* case, we are compelled to recommend that the case be remanded to the district court, with orders to state an account between John R. Conklin and the heirs of Samuel Coffman, and to make a finding of facts showing the items allowed and disallowed on the account of each.

As the parties have acquiesced in the judgment of the district court so far as it established the tax lien claimed by Thompson, and finding Baldrige & De Bord the owners in fee of one-half of the land involved in the controversy, we recommend that the judgment of the district court be affirmed to the extent that it finds Thompson entitled to a lien for taxes and Baldrige & De Bord the absolute owners of a one-half interest in said land, and that it be reversed and remanded for a statement of the account between John R. Conklin and the heirs of Samuel Coffman.

By the Court: For the reasons stated in the foregoing opinion, the decree of the district court is affirmed in so far as it establishes a tax lien in the land in suit in favor of Thompson and in so far as it establishes the right of Baldrige & De Bord to a one-half interest in said land, and is reversed and remanded to the district court, with directions to state an account between John R. Conklin and the heirs of Samuel Coffman.

JUDGMENT ACCORDINGLY.

## A. F. HAISH V. ABNER DILLON.

FILED MARCH 2, 1904. No. 13,391.

**Stating an Account.** In stating an account, as in making any other agreement, the minds of the parties must meet, and the transaction must be understood by the parties as a final adjustment of the respective demands between them, and the amount then due.

ERROR to the district court for Kearney county: Ed L. ADAMS, JUDGE. *Reversed.*

*Hague & Anderbery*, for plaintiff in error.

*Lewis C. Paulson and J. L. McPheeley*, contra.

DUFFIE, C.

Plaintiff in error was plaintiff in the court below. He sued Dillon on an open account claiming a balance due of \$65.60 for various items, including some work done for Dillon by a hired hand, one Capps. Dillon answered, first, by a general denial, and, second, that a full and final settlement was had between plaintiff and himself, in which it was found that there was a balance due the plaintiff of \$30.60, provided, however, that Capps should verify the amount of work that was done by him in the way of husking corn for the defendant, and that, if the amount charged for his work in the settlement should be reduced by him, then the amount of such reduction should be subtracted from the \$30.60 otherwise agreed upon. That Capps reduced the amount claimed by plaintiff for his work by \$9, thus fixing the amount of \$21.60 as the amount due the plaintiff. It was further alleged that this amount had been tendered the plaintiff before suit brought and that he refused to accept the same. The reply of plaintiff denied a settlement. The evidence shows that some time in December the parties met and agreed upon the different items of the account existing one against the other, except an item of \$18 for 90 hours' work in husking

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corn performed for Dillon by Capps, the hired man of Haish. Haish had a statement, which he claimed was furnished him by Capps, showing the number of hours that he worked, and it is conceded that if this statement is correct, the balance agreed upon between the parties was \$30.60 in settlement of all accounts between them. It appears, however, that Dillon was not satisfied with the statement, and refused to agree to the amount until it was verified by Capps; that Capps afterwards, when called on, claimed that the statement was incorrect and that he had worked only one-half the time shown by the statement. It is now insisted by Dillon that Haish agreed to accept in full settlement of his claim \$30.60, less any overcharge which Capps should say was made for his services.

It will be seen from this statement that Dillon defended upon the theory that an account had been stated between the parties, that a tender of the amount had been made, and that the action could not therefore be maintained; and in its third instruction the court told the jury: "Under the issues joined and under the answer filed, the burden of proof is on the defendant to prove by a fair preponderance of the evidence the settlement that he claims was made. Unless you are satisfied by a preponderance of the evidence that a settlement was made as alleged by him, then you will not consider such allegations in his answer." It will be seen from this instruction that the case was submitted to the jury upon the theory that what took place between the parties relating to a settlement had fixed and determined the amount due the plaintiff. In other words, that an account had been stated between them. We do not think that either the defendant's answer, or the evidence offered in support thereof, shows an account stated. The rule is uniform that in stating an account, as in making any other agreement, the minds of the parties must meet. *Lockwood v. Thorne*, 18 N. Y. 285; *Stenton v. Jerome*, 54 N. Y. 480; *Raymond v. Leavitt*, 46 Mich. 447; *McKinster v. Hitchcock*, 19 Neb. 100; *Hendrix v. Kirkpatrick*, 48 Neb. 670.

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whose duties required him to put the elevator in motion and operate the same in transporting guests, and other persons having a right to be transported thereon, to and from the different floors of said hotel building. It was the duty of the elevator boy to keep the doors of the elevator shaft closed on each of the floors, when the elevator car was not stationed at a given floor ready for the entrance and departure of passengers into and from said elevator car. Paragraphs 8½, 9 and 10 of the petition are in the following language:

"8½. That at the times hereinafter and heretofore mentioned, it was the duty of the defendant to keep said elevator, elevator shaft and the doors leading to the car, in proper and safe condition, and it was the duty of said defendant to keep said elevator door on the first floor of the building herein mentioned closed at all times, except when the car of said elevator was standing at said floor ready to receive passengers and persons for transportation therein, and it was the duty of said defendant to keep the door of the elevator shaft at said floor in good order, so that the same would fasten from the inside and remain fastened in such manner that the same could not be opened from the outside without a key, and keep the same securely fastened at all times when said elevator car was not at said floor ready to receive passengers for transportation in said car; that the defendant negligently failed to provide a proper fastening for said door, and negligently failed to keep said door closed at the time of the injury herein complained of, while said car was above the first floor, thus leaving the shaft of said elevator open, unguarded and without proper lighting about said elevator and the shaft, or any other warning; that the defendant negligently kept for use on the first floor of said building, at said elevator shaft, a door, through which entrance to the said shaft and the said car was made, said door being negligently and carelessly constructed; that the same could be opened from the outside of said elevator shaft without a key, and that said door, on said occasion, was so negli-

gently and carelessly constructed and maintained that the same failed to catch when it was closed, all of which foregoing was well known to defendant herein, the plaintiff herein being ignorant at the time of said accident of the aforesaid conditions and the negligence of the defendant.

"9. That, at the time aforesaid, to wit: on April 6, 1901, between the hours of 11 o'clock and 12 o'clock P. M., the plaintiff was directed by the defendant to take the baggage of a guest of said hotel, and accompany said guest to a room which had been assigned to said guest above the first floor of said building; and, at said time, *the elevator man or boy in charge of the car of said elevator caused the door opening into the elevator-way, shaft or opening on the first floor of said building, where the plaintiff and said guest were, to be opened, and remain open while the said elevator man or boy stood near the said door or opening.*

"10. That, at said time, the defendant, well knowing the premises aforesaid, negligently and wrongfully left said door on said floor, where the plaintiff and said guest were, open, and the said elevator-way or shaft unguarded, and without any signal or warning; in consequence whereof the plaintiff aforesaid, while lawfully and properly on said ground floor in the building aforesaid, believing that the elevator car was there in the said shaft, and on the ground floor, in waiting and readiness to receive passengers for carriage, *and induced to so believe by the fact that said door was standing open as aforesaid, and by the further fact that said elevator man or boy, having charge of said car, was standing at or near said door and opening, apparently prepared to transport passengers in said car, and believing then by entering said door he would be stepping into the aforesaid elevator car, and it being dimly lighted in and about said shaft and car, entered and passed through said door or doorway; and the said elevator car not being in that portion of the shaft, but at some place above the ground floor of said building at that time, without any fault on his part, the said plaintiff fell into, down and through said elevator-way or shaft, from the ground*

floor of said building to the lower floor or basement thereof, among timbers and structures, in the bottom of said shaft."

We have copied the foregoing paragraphs of the petition for the reason that the court, in its instructions to the jury, and the defendant in error, in his argument in this court, assumed that the plaintiff below, in his petition, charged the defective condition of the lock or catch of the elevator door to be an act of negligence on the part of the defendant, and one of the proximate causes of the injury to the plaintiff below. The plaintiff below, in his testimony, in describing the accident and the causes that led thereto, states that, on or about midnight of the day the accident occurred, he was doing some work behind the counter in the Paxton Hotel office; that a guest arrived at the hotel and, after registering, desired to be assigned to a room; that plaintiff below was requested by the night clerk to show the guest to the room assigned to him; that he took the key of the room and the grip of the guest and started toward the elevator, the door of which stood open, the elevator boy who had charge at that hour being some 30 feet away, standing in the rotunda of the hotel; that he turned his head and indicated to the elevator boy that his services were required, and, supposing that the car of the elevator was standing on a level with the office floor, from the fact that the door was open, he stepped into the elevator shaft, and fell to the basement, some ten feet beneath, and on to the cross beams that supported the elevator, one of his legs being broken by the fall. It appears from other evidence in the case that, a short time prior to the accident, another bell boy had taken a guest to one of the upper floors of the hotel, using the elevator for that purpose, the boy in charge of the elevator being absent at the time in the water closet; that, according to the rules and customs of the hotel, he closed the elevator door at the upper floor, upon leaving the elevator with the guest in his charge, after starting the elevator on its way down to the office floor by pulling the rope which controlled its action,

it being the custom for the bell boys to use the elevator in showing guests to their rooms, but to use the stairway of the hotel in returning to the office. This bell boy, one Mulligan, states that, on entering the elevator with the guest, he closed the door, but he could not state whether the latch caught; and defendant in error insists that, on account of the defective condition of the latch or lock of the elevator door, it did not catch, and the door rolled back and opened of its own accord, and because of this defective condition of the lock, and of the negligence of the hotel company in not repairing the same so that it would catch and hold the door in place, the door came open, thus indicating to him that the car of the elevator was standing at the office floor, and that this negligence was the cause of his injury. As we read the petition, the negligence charged, and which caused the injury, was the act of the elevator boy in charge of the elevator in leaving the door on the office floor open, while in charge thereof, and while standing near the elevator entrance, the elevator car not being at the office floor.

The ninth paragraph of the petition, after reciting the direction of the clerk to the plaintiff below to show the guest to his room, then alleges: "And, at said time, the elevator man or boy in charge of the car of said elevator, caused the door opening into the elevator-way, shaft or opening on the first floor of said building, where the plaintiff and said guest were, *to be opened, and remain open while the said elevator man or boy stood near said door or opening.*" The car of the elevator, as alleged in the next paragraph, "*not being in that portion of the shaft, but at some place above the ground floor of said building at that time.*"

Whatever may have been the theory of the plaintiff below in framing his petition, it certainly does not charge that the defective condition of the lock of the door was the proximate cause of the injury, but it does charge, in explicit terms, that the injury arose from the elevator boy leaving the door open and standing in the vicinity, thus

indicating to the plaintiff below that the car of the elevator stood at the office floor, and that he might safely enter the door of the elevator. That the elevator boy, through whose negligence it is charged the plaintiff below was injured, was a fellow servant is amply sustained by the authorities. *Norfolk Beet-Sugar Co. v. Koch*, 52 Neb. 197; *McCarty v. Rood Hotel Co.*, 144 Mo. 397; *Stevens v. Chamberlin*, 40 C. C. A. 421, 51 L. R. A. 513, and note. That one servant can not recover from the common master for negligence of a fellow servant, where no negligence is charged against the master in employing, or keeping in his employ, the servant whose negligence caused the injury, is too well established to need a citation of authorities. The court admitted evidence of the defective condition of the latch or lock on the elevator door, and it is now insisted that, because the trial proceeded upon the theory that that was an issue in the case and one of the acts of negligence charged against plaintiff in error, it is too late to raise the question at this time. And *Colorado Mortgage & Investment Co. v. Rees*, 21 Colo. 435, is cited as an authority in support of this position. In that case it is held that a party desiring to take advantage of a variance between the declaration and the evidence should object to the evidence when offered, and point out wherein the variance consists, so that the other party may amend the declaration and thus avoid the objection. It appears only to have been made after the plaintiff's had closed their evidence, when the right to make it had been waived.

The better rule undoubtedly is, that a party who desires to take advantage of a variance between the pleadings and the proof offered by his adversary, should object to the introduction of the evidence upon that ground, and, if he allows the trial to proceed without objection, it is a waiver on his part, and he can not thereafter take advantage of the variance or say that the question concerning which the evidence was offered was not in issue in the case. In this case, however, the defendant did object to the evidence. The witness by whom the defective condition of this



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lock was sought to be shown was asked this question: "How was this door on the first floor of the Paxton Hotel leading to the elevator? Describe the condition of the lock from February on to April. If you slammed the door shut, what was its condition, whether it would catch or not?" "Objected to as incompetent and no foundation laid and not within the issues and irrelevant. Overruled. Defendant excepts."

Here was a plain objection to the offer of this testimony, upon the ground that it was not within the issues and irrelevant. Whether a more particular objection was made in any argument addressed to the court, of course, is not shown by the record, but the objection clearly calls the attention of the court and the plaintiff below to the fact that the evidence offered was outside of the issues made by the pleadings. In this condition of the record, we think the proof was improperly admitted, and, being improperly admitted, it was error for the court to submit the case to the jury upon the assumption that the negligence complained of, and which caused the injury, was a failure on the part of the plaintiff in error to equip the elevator door with a proper catch, or to repair it, if out of order. The case having been submitted and apparently determined against the plaintiff in error upon an issue not made by the pleadings, we recommend a reversal of the judgment.

LETTON and KIRKPATRICK, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is

REVERSED.

**FREDERICK DANIELSON V. JOHN J. GOEBEL.**

FILED MARCH 2, 1904. No. 13,368.

1. **Contract for Sale of Land: VALIDITY.** Under the provisions of section 74, chapter 73, Compiled Statutes, 1901, a contract for the sale of land between the owner thereof and an agent or broker must be signed by the owner and broker, must contain a description of the land, and set forth the amount of compensation the agent is to receive for negotiating a sale, or it will be void and furnish no basis for recovery.
2. **Petition: SUFFICIENCY.** Petition examined, and *held* not to state facts sufficient to entitle plaintiff to any relief.

ERROR to the district court for Cedar county: GUY T. GRAVES, JUDGE. *Reversed.*

*O. E. Martin* and *W. A. Martin*, for plaintiff in error.

*C. H. Whitney*, *contra.*

KIRKPATRICK, C.

On December, 26, 1901, defendant in error, John J. Goebel, instituted an action against plaintiff in error, Frederick Danielson, in the district court for Cedar county, to recover a commission alleged to be due him for services performed in finding a purchaser for certain land owned by plaintiff in error. There was judgment in the district court against plaintiff in error in the sum of \$235 and costs; to reverse which the cause is presented to this court upon error. Numerous assignments of error are presented for consideration, but, in the view we take of the case, all need not be considered.

It is first contended that the court erred in overruling an objection interposed by plaintiff in error, at the commencement of the trial, to the introduction of any testimony, for the reason that the petition failed to state facts sufficient to entitle plaintiff below to any relief. In the petition it is alleged that on the 24th day of February,

1901, plaintiff in error wrote a letter to defendant in error in the language following:

"Emerson, Neb., Feb. 24, 1901. John J. Goebel, Dear Sir: You sell all my land. If you sell it you get good commission. I have it in three real estate man's hands and then in myself. Whoever sells it gets the commission. The Matsen place I want \$40 an acre for 160, and \$25 for 80 of pastor. Yours Truly, F. Danielson."

It is alleged that, on receipt of this letter, defendant in error went out and secured a purchaser for the tract designated as the Matsen land, and thereupon wrote plaintiff in error the following letter:

"Hartington, Neb. Feby. 25th, 1901. Fred Danielson, Esq., Emerson, Neb. Dear Sir: Your letter dated Feby. 24th, 1901, at hand & contents noted, just having a customer for a farm close to town, I at once proceeded to look him up, and read your letter to him, and he and his wife went and looked it over, and before he went home he called at my office and informed me that he would take it, and told me to send for the deed; that the money was ready for the land any time, and if you did not want to send the deed here, you could deposit it in a bank at Emerson and he would remit it there. He is a good reliable man, and is able to pay all cash. He deposited \$500 in the bank as part payment of the purchase price subject to your order. Now please execute deed and do as above stated, instructing the bank to pay me my commission oblige. Respt. John J. Goebel."

It is further alleged that the purchaser was willing and ready to pay the money and complete the purchase, and that plaintiff in error and his wife refused to execute the conveyance; and that they promised defendant in error that they would pay him his commission, notwithstanding they did not make the sale. It is not alleged that any other writing was signed by either of the parties than the two letters quoted above, and the question for determination is: Are the facts pleaded, tested by the provisions of section 74, chapter 73, Compiled Statutes, 1901

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(Annotated Statutes, 10258), sufficient to entitle defendant in error to relief. The section referred to is in the words following:

"Every contract for the sale of lands, between the owner thereof, and any broker or agent employed to sell the same, shall be void, unless the contract is in writing and subscribed by the owner of the land and the broker or agent, and such contract shall describe the land to be sold, and set forth the compensation to be allowed by the owner in case of sale by the broker or agent."

The section quoted would seem to be too clear to require interpretation. The undoubted purpose of the legislature was to remedy an evil which had grown up in this state, as shown by innumerable actions brought by real estate brokers against the owners of real estate, to enforce the collection of commissions for negotiating sales which, in many instances, were never completed. To effectuate this purpose, they enacted the section quoted, which, in express terms, requires a written contract between the owner and the agent signed by both, and further requires that the contract shall describe the land to be sold and shall set forth the compensation to be allowed to the broker or agent in case of sale.

It can not be contended, we think, that the two letters quoted in the petition amount to such a contract as is contemplated by this statute. Whether the letter written by defendant in error contains a sufficient description of the land need not be determined, but it is manifest that it does not set forth the amount of compensation which the owner was to pay to the agent who negotiated the sale. Defendant in error made no answer to this communication until after he had entered upon the performance of the services for which he seeks in this action to recover. He seems, on receipt of the letter, to have gone out and procured a purchaser, and then to have written plaintiff in error, telling him that he had made the sale, and asking him to execute and send the deed, and to authorize the bank to pay his commission. We are not required to de-

termine whether, if the owner of real estate wrote to an agent, employing him to make a sale of his land, describing it and agreeing to pay a stipulated commission therefor, and the agent should answer in writing, accepting the employment on the terms stated, this might not constitute a valid contract within the statute. But the letters quoted do not present such a case. Plaintiff in error by letter authorized defendant in error to make a sale of all of his land, the latter answering that he had made a sale of the Matsen land. In neither of the letters is any reference made to the amount of compensation, and it is clear that the contract, assuming that the letters constituted one, does not meet the requirements of the statute, is void, and can not be made the basis of a recovery by the agent of a commission from the owner of the land. The petition fails to state facts sufficient to warrant a recovery, and the lower court erred in overruling the objection to the introduction of any evidence thereunder.

It is further contended that the statute in question is in conflict with the constitution, in that it interferes with the rights of persons otherwise competent to make their own contracts. We do not think it is necessary to re-examine this question after its exhaustive consideration in the opinion by the late chief justice in the case of *Baker v. Gillan*, 68 Neb. 368, where the enactment of this statute is held to have been within the power of the legislature under the constitution.

Numerous other assignments of error are made, some of which seem to possess merit, but, in the view we have taken, it becomes unnecessary to examine these and to pass thereon. For the error pointed out, it is recommended that the judgment of the district court be reversed and the cause remanded.

DUFFIE and LETTON, CC., concur.

By the Court: For the reasons stated in the foregoing

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Gaffey v. Northwestern Mutual Life Ins. Co.

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opinion, the judgment of the district court is reversed and the cause remanded.

REVERSED.

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HERBERT H. GAFFEY V. NORTHWESTERN MUTUAL LIFE INSURANCE COMPANY ET AL.

FILED MARCH 2, 1904. No. 13,413.

1. **Equity Court: POWERS.** When a court of equity has taken cognizance of a case involving the right of rival claimants to the possession of leased premises, with all parties interested in the premises in court, it has full power to do equity by placing the party whom it finds entitled thereto into possession of the premises.
2. **Findings: REVIEW.** Findings of fact made in a case tried to a court are entitled to the same weight as a verdict of a jury, and a judgment inconsistent with and contrary to the findings will be reversed.

ERROR to the district court for Lancaster county:  
EDWARD P. HOLMES, JUDGE. *Reversed with directions.*

*Charles O. Whedon*, for plaintiff in error.

*Hall & Marlay*, contra.

LETTON, C.

This action was begun by the Northwestern Mutual Life Insurance Company of Milwaukee, a corporation, George Woods and Mark Woods, as plaintiffs, against Herbert H. Gaffey, as defendant. The petition alleged, in substance, that the plaintiff corporation is the owner of the building in the city of Lincoln, known as the "Burr Block." That the east basement room of the building has been let to the plaintiffs Woods for the term of six years, and no other persons have any right to the possession thereof. That the defendant Gaffey has broken into said room and, unless restrained by the court, will again break into it and deprive the plaintiffs of the use and possession of said property. The prayer is that the defendant be enjoined

and restrained from breaking into said east basement room in the Burr Block, from keeping the plaintiffs out of their property, or in any manner interfering with the plaintiffs or their property, and that at the final hearing of the case the injunction may be made perpetual. A temporary injunction was granted enjoining the defendant as prayed. The defendant's answer, in substance, is as follows: that he admits the Northwestern Mutual Life Insurance Company is the owner of the building, and denies every other allegation of the petition; and for a cross-petition alleges that, on or about the first day of March, 1892, he leased from the then owners of said building the room over which the controversy in this case arises, for a term of three years. That, at the expiration of the said three years, said lease was renewed for a second term of three years, and so on until the last day of February, 1901, when he entered upon the fourth term of three years, which will expire on the last day of February, 1904. That he has been in the exclusive possession of said premises, except as hereinafter stated, as tenant of said owners and of their grantee, the insurance company, plaintiff herein. He alleges that the insurance company desired to raise the floor of the room above his, and it requested the defendant to remove a portion of his stock of goods into a room underneath the sidewalk, which he did to accommodate the insurance company, and that the said plaintiff company then occupied a large portion of his said room with its appliances for raising the floor. He alleges that the plaintiffs Woods occupied the room immediately overhead as real estate agents and live stock dealers for about three years, and that the changes made by the plaintiff insurance company in the building deprived the plaintiffs George and Mark Woods of the room they had previously occupied. That the insurance company and the Woods Brothers, on the 22d day of July, 1902, conspired together to eject him; and, when this defendant was absent from his room, they went with a force of men into said room, forcibly ejected the defendant's clerk, and put out of

said room all the property belonging to the defendant except the office desk, safe and a chair; took the lock off the door, put another lock on and locked this defendant out of said room; and that ever since said date the plaintiffs have kept the said George Woods and Mark Woods in said room, and repeatedly put out the defendant's clerk and interfered with defendant's occupation of said room. That, after the plaintiffs had obtained possession wrongfully as aforesaid, they began this action, well knowing the falsity of the petition; and by their actions in ejecting the defendant, removing his goods, etc., the defendant has been damaged \$10,000. He prays that the restraining order may be dissolved; that the plaintiffs' action may be dismissed; that a mandatory injunction may be awarded requiring the said George Woods and Mark Woods forthwith to vacate the premises; to restore to the defendant all the property which they removed from there, for the sum of \$10,000 damages, and for a perpetual injunction against the plaintiffs to enjoin them from interfering with the defendant's possession of said basement room. A supplemental answer and petition were afterwards filed, a recital of the contents of which is not essential to the determination of the questions at issue here. The plaintiffs filed a reply alleging, in substance, that the defendant was only a tenant from month to month until in the month of May, 1902, at which time he vacated said room, surrendered the premises and turned the same over to the plaintiff insurance company, since which date he has not been a tenant of said room; that he notified the insurance company, when he vacated said premises, that he would not pay the rent they were demanding, and they could rent to some one else, and that as soon as the repairs were completed said insurance company rented said room to the plaintiffs Woods. That the defendant never asserted any rights to said room until after he learned the insurance company had rented the room to George and Mark Woods. The plaintiffs ask that the defendant's cross-bill may be dismissed, and that the temporary in-



junction heretofore granted may be made perpetual. A demand for a trial to a jury was made by the defendant, which was refused by the court, and this refusal is assigned as error. The case was tried to the court, and the court made the following findings of fact and conclusions of law, and entered the following judgment:

"(1) That the plaintiff is a corporation, as alleged in its petition, and is the owner of and in possession of lots seven (7) and eight (8), in block forty (40), in the city of Lincoln, Lancaster county, Nebraska, and that the building situate thereon is known as the 'Burr Block.'

"(2) That on or about the first day of March, 1892, the said defendant, Herbert H. Gaffey, leased from C. C. and L. C. Burr, being then the owners of said described premises, the east basement room of said building for a period of three years, at an agreed rental of \$25 a month, and that the said defendant continued in uninterrupted possession of said premises up to and about the time of the controversy arising in this case.

"(3) That the plaintiff herein became the owner of said premises on or about the — day of —, and took possession thereof, but that for a long time prior thereto said premises were in possession of its receiver, appointed by the court in the foreclosure proceedings being had upon said premises, but that during all of said time the said defendant Gaffey was a tenant of such parties, in possession, and remained in the possession thereof up to the time hereinafter described. That the said defendant Gaffey was not made a party in the foreclosure proceedings, but waived all rights thereunder by oral agreement in reference to the occupancy of said east basement room with the receiver thereof, and by oral agreement entered into various and different contracts in regard to the rental thereof, both during the ownership of the said Burrs and the plaintiff herein, and that by reason thereof said written lease herein mentioned, as made with the said Burrs, was abrogated, annulled and vacated, and that at the time of the commencement of this action the said defendant Gaffey

was a tenant of the said plaintiff by virtue of an oral agreement, holding possession of said east basement room from month to month, and had no greater claim or rights thereto than herein found.

"4. That, in order that the said plaintiff company might make certain changes and improvements in and about the said premises, the said defendant, Gaffey, voluntarily upon his part, removed from the said basement room, so occupied by him, all of his stock of goods, wares, and merchandise, consisting of plumbing and packing goods, and a general stock of plumbers, steam and gas fitters goods, in which the said defendant was a dealer, and permitted the said plaintiff to enter said basement room for the purpose of remodeling and rebuilding a part of said building.

"(5) That said defendant stored said goods, so removed by him, in a room beneath the sidewalk immediately adjacent to the room so occupied by him, but the said defendant left a portion of his property in said basement room, the property so left by him consisting of his office desk, safe, work bench and iron pipe, but said property was used by him, and was incident to the conduct and management of his said business.

"(6) That the room beneath the sidewalk herein mentioned had been occupied by the said defendant ever since the making of the written lease first herein described, and that, in removing said stock of goods from said basement room to the sidewalk space aforesaid, the said defendant fully intended to move the same back into the said basement room upon the completion of the improvements then being made by the said plaintiff, as herein described, but that the removing of such merchandise to the sidewalk space, as aforesaid, was wholly the act of the said defendant Gaffey, and without direction on the part of the plaintiff, and without the said plaintiff's knowledge, but was done for no other purpose than a matter of convenience to the said Gaffey, expecting and intending to return to said basement room upon the completion of the improvements as aforesaid.

"(7) That, prior to the commencement of this action, and while the said defendant Gaffey was in possession of the said basement room, by having his office desk, safe and work bench therein, and while expecting and intending to move his wares and merchandise therein, the plaintiff company, without notice, and without legal proceedings being had, ejected the said defendant from the said premises by removing his office desk, safe and work bench so contained in said basement room, and without the defendant's consent, and without due process of law, caused to be placed other tenants therein, and placed other tenants in possession of said basement room; that the said defendant's property was removed from said premises during the defendant's absence and that the plaintiff by and through its agents, took forcible possession of said premises, and ever since said time has had possession thereof, and excluded the defendant Gaffey therefrom.

"(8) That the said defendant Gaffey, believing that he had a right to the possession of the said premises, with violence and force of arms sought to again reenter the premises and hold the same to exclusion of the tenants and occupants thereof, who had entered upon the occupancy of the premises by and through the acts of the plaintiff herein. That such tenants so procured by the plaintiff company, and who were in possession of said premises at the time of the commencement of this action, had never prior thereto occupied the same, or had an interest therein, but that their possession of said premises commenced at the time of the controversy arising in this action, and was by and through the acts of the plaintiffs.

"Wherefore, the court finds the following conclusions of law:

"(1) That the said defendant Gaffey was wrongfully evicted from said premises by the plaintiff company and, whether he was in default of the payment of rent, or otherwise unlawfully withholding said premises, is immaterial so far as this action is concerned. He had not relinquished possession of the premises, and, therefore, the only proper

remedy to which the plaintiff company could resort was by an action of forcible entry and detainer.

"(2) That the said defendant having removed his wares and merchandise voluntarily upon his part to a damp and insecure place, whereby they became damaged, yet the court finds that he would not be entitled to recover on account thereof, the said defendant having full knowledge of the character of such place and the dangers attending the storing of such merchandise in the place selected, and the plaintiff company would in no wise be responsible for any injury or damages flowing therefrom.

"(3) That, by reason of the unlawful seizure on the part of the plaintiff of the said defendant's property, and removing it from the premises without due authority of law, as is found by the court herein, the court finds that the said defendant was damaged in the sum of \$50 and for which amount the defendant is awarded judgment.

"(4) That the said defendant having threatened to re-enter said premises by force, the plaintiff company is entitled to a permanent injunction against the said defendant forever enjoining him from reentering the said premises for the purpose of taking possession thereof.

"It is ordered that each party pay their own costs.

"It is therefore considered and adjudged by the court that the said defendant, Herbert H. Gaffey, do have and recover of and from the plaintiff, The Northwestern Mutual Life Insurance Company, the said sum of \$50, damages as assessed by the court, with interest thereon at the rate of 7 per cent. per annum from this date until paid.

"It is further considered and adjudged by the court that the said defendant, Herbert H. Gaffey, be, and he is hereby, forever enjoined and restrained from reentering or attempting to reenter the premises hereinbefore described, for the purpose of taking possession thereof. It is further ordered and adjudged by the court that each party hereto, plaintiffs and defendant, pay their own costs herein, the costs of the plaintiffs being taxed at \$44.96,

and the costs of the defendant being taxed at \$28.12, for all of which execution is hereby awarded.

"To all of which both the plaintiffs and defendant duly except to each and every finding of fact and conclusion of law as found herein by the court. Each party is allowed 40 days in which to settle a bill of exceptions."

A motion for a new trial was filed and overruled, and the case has been brought to this court upon error.

The testimony has not been preserved by a bill of exceptions, and we are therefore compelled to accept the findings of fact made by the court as verity. The plaintiff in error in his petition in error makes 16 assignments; but, in the view that we take of this case, it will only be necessary to consider the fifth, sixth, seventh, eighth, ninth, tenth, eleventh and sixteenth assignments, which assignments in effect present as error that, while the court in its findings of fact found that the defendant was rightfully in possession of the premises, and that the plaintiffs ejected defendant from the same wrongfully and forcibly, without notice and without legal proceedings, yet the fourth conclusion of law made by the court erroneously found that, the said defendant having threatened to reenter said premises by force, the plaintiffs are entitled to a permanent injunction against the said defendant forever enjoining him from reentering the said premises for the purpose of taking possession thereof; and also assigning as error that the judgment of the court, wherein it was adjudged that the defendant be forever enjoined and restrained from attempting to reenter the premises for the purpose of taking possession thereof, and adjudging that the defendant pay his own costs in the case, is inconsistent with the findings of fact made by the court and therefore erroneous.

It is evident from an examination of the findings of fact that the plaintiffs, at the time of the forcible and wrongful ejection of the defendant Gaffey from the room, were not entitled to the possession of the room, and were wrongful intruders therein. This being the case we fail

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to understand why a rightful owner or tenant in possession of premises should be restrained from reoccupying his own premises, merely because a wrongdoer has taken possession.

It was argued that the trial judge should be presumed to have known facts which made the judgment rendered the proper one under the circumstances, but when the evidence is not preserved, and special findings of fact are made, a reviewing court can look only to these findings, taking them as absolute verity, to ascertain whether the judgment rendered is in conformity therewith. If the judgment is inconsistent with the findings, the court can not go outside of the record in search of facts to bolster up the judgment. Nor can it presume that the trial court based the judgment upon other facts than those ascertained and set forth in its special findings. *Oliver v. Lansing*, 57 Neb. 352.

It may be said that to allow the defendant to take forcible possession of the premises in controversy might lead to a breach of the peace, but his right to the possession of the premises having been fully tried and determined in this action, all parties to the controversy being before the court, it was within the power of the court to prevent anything of this kind, by directing the intruders who were parties to this action peaceably to deliver possession to the defendant, and the powers of the court were sufficient to enforce a compliance with this order. In other words, the parties having submitted the entire issue regarding the right of the possession of the premises to the court, and the court having found for the defendant Gaffey upon that point, he was entitled to the fruits of his victory as fully as if the action had been in the form of forcible entry and detainer. It would be but a poor satisfaction to a litigant if, after establishing the rightfulness of his cause, he should receive no relief, and further be compelled to pay the costs of his effort to obtain justice. The facts as found by the court entitle the defendant Gaffey to a mandatory injunction against the plaintiffs com-

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manding them to restore to the defendant the possession of the premises, perpetually enjoining the plaintiffs Woods from interfering with his possession, and enjoining the plaintiff insurance company from interfering with the defendant's rights and privileges as a tenant from month to month of said premises. For these reasons the judgment of the district court should be reversed so far as the defendant Gaffey is enjoined and restrained from taking possession of the premises, and the costs by him incurred were taxed to him.

We recommend, therefore, that the cause be reversed and remanded to the district court, with directions to said court to render a judgment and decree ordering that the said defendant Herbert H. Gaffey do have and recover of and from the plaintiff, the Northwestern Mutual Life Insurance Company, the sum of \$50, damages as assessed by the court, with interest thereon at the rate of 7 per cent. per annum from the 28th day of March, 1903; that the injunction heretofore granted in this case be dissolved; that a mandatory injunction issue against the plaintiffs George Woods and Mark Woods, commanding them forthwith to vacate said premises, and to restore to the defendant his office desk, safe and work bench taken from said basement room; that the plaintiffs George Woods and Mark Woods be perpetually enjoined from in any manner interfering with the defendant's possession of said premises, and that the plaintiff insurance company be perpetually enjoined from interfering with the rights of said defendant to said room as tenant from month to month, and that the defendant recover his costs herein.

**DUFFIE and KIRKPATRICK, CC., concur.**

By the Court: For the reasons stated in the foregoing opinion, the cause is reversed and remanded to the district court, with directions to said court to render a judgment and decree ordering that the defendant Herbert H. Gaffey do have and recover of and from the plaintiff, the

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Northwestern Mutual Life Insurance Company, the sum of \$50, damages as assessed by the court, with interest thereon at the rate of 7 per cent. per annum from the 28th day of March, 1903; that the injunction heretofore granted in this case be dissolved; that a mandatory injunction issue against the plaintiffs, George Woods and Mark Woods, commanding them forthwith to vacate said premises, and to restore to the defendant his office desk, safe and work bench taken from said basement room; that the plaintiffs, George Woods and Mark Woods, be perpetually enjoined from in any manner interfering with the defendant's possession of said premises, and that the plaintiff insurance company be perpetually enjoined from interfering with the rights of said defendant to said room as tenant from month to month, and that the defendant recover his costs herein.

JUDGMENT ACCORDINGLY.

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A. W. PADGET ET AL. V. CORNELIUS J. O'CONNOR.

FILED MARCH 2, 1904. No. 13,345.

1. **Promissory Note: LEGALITY.** Where an illegal transaction constitutes a part of the consideration for a promissory note, the other portion of the consideration being lawful, the illegality of the part taints the whole consideration, and the courts will not enforce the collection of such a note in the hands of the original parties.
2. **Directing Verdict.** Where there is conflicting evidence with regard to whether or not the holder of a negotiable promissory note is an innocent purchaser, for value, before maturity, the question is a question of fact for the jury, and it is error for the court to direct a verdict for the plaintiff.

ERROR to the district court for Cuming county: JAMES F. BOYD, JUDGE. *Reversed.*



*Anderson & Keefe and McNish & Graham*, for plaintiffs in error.

*R. E. Evans, contra.*

LETTON, C.

This action was brought by Cornelius J. O'Connor, as plaintiff, against A. W. Padget, T. J. Foley and John C. Sullivan, as defendants, to recover the amount due upon two promissory notes, on the face of which the said Padget and Foley appeared as makers, and John C. Sullivan as payee and endorser. O'Connor alleged he had purchased these notes before maturity, in the usual course of business, for a valuable consideration, from the defendant John C. Sullivan. The defense set up by Padget and Foley, in substance, is that the notes were given by Padget as principal, and Foley as surety, to one E. E. Sullivan, in part payment of the purchase price of a stock of liquors, saloon fixtures and the unexpired term of a saloon license in Bancroft, Nebraska. That, for the purpose of defrauding his creditors, E. E. Sullivan procured the notes to be made payable to John C. Sullivan, his brother, instead of to himself; that a part of the consideration for the same was illegal, being for the six months unexpired term of the license of E. E. Sullivan, and that Sullivan delivered the possession of the saloon to Padget, and Padget sold liquor for himself under Sullivan's license for six months, as agreed, and that O'Connor had knowledge of all these facts and was not an innocent purchaser of the notes. A further defense was, in substance, that the Fred Krug Brewing Company procured a judgment against E. E. Sullivan in the county court of Cuming county. That an execution was issued and returned unsatisfied upon said judgment. That garnishment proceedings were had after the return of said execution, and that Padget, Foley and the Citizens Bank of Bancroft, which was then in possession of the notes sued upon as agent of O'Connor,

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were garnished in said action. That the bank answered admitting that it had possession of the two notes and delivered the same under the order of the county court to the court. That the court found that the notes were the property of E. E. Sullivan, and subject to the judgment of the Fred Krug Brewing Company. That Padget and Foley paid into said county court of Cuming county the amount due on said notes, and that the county judge marked them as paid, and applied the money in payment of the judgment of the Fred Krug Brewing Company against E. E. Sullivan. The plaintiff replied denying the allegations of the answers, and alleging that the notes had been made payable to John C. Sullivan in payment of a debt from E. E. Sullivan to him.

At the trial in the district court, the original notes were introduced in evidence. The record of the proceedings in garnishment before the county court of Cuming county was excluded from the jury upon the objection of O'Connor, and a verdict was directed for O'Connor against the defendants, Padget and Foley. From this judgment they prosecute error to this court.

At the trial, O'Connor testified that he purchased the notes from John C. Sullivan, by applying them in payment of a debt due from Sullivan to him for rent of land in the Wiunnebago reservation, and by paying the sum of \$170 in cash to make up the amount of the notes; that he knew nothing of any transaction between the two Sullivans as to a transfer of the notes for the purpose of defrauding creditors, or whether it was for the sale of a license or not; that he did not know that a saloon license had been sold; that, at the time of the maturity of the notes, the notes were sent to the Citizens Bank of Bancroft for collection, by his direction.

L. H. Keefe, one of the attorneys for the defendants, testified that he had a conversation with Mr. O'Connor over the telephone, and that he asked O'Connor if he knew, at the time he bought the notes, that they were given for the stock of liquors, the fixtures and the unexpired term

of the license, and that O'Connor said that he had not bought the notes but had them for collection; that Sullivan had explained the transaction to him, and that he knew the license was included. Padget testified that the notes were given for the balance due upon the purchase of the saloon; that he was to give \$1,597.83 for the fixtures, the liquors and the unexpired license; that the saloon was to be run by Padget, in the name of E. E. Sullivan, for the unexpired term of six months. O'Connor, in rebuttal, denies the conversation to which Keefe testifies, and, in turn, Keefe testifies denying a conversation which O'Connor says he had with him. At the conclusion of the testimony, the court sustained a motion for a direction to the jury to return a verdict for the plaintiff. A motion for a new trial was filed and overruled, and judgment rendered for the plaintiff. The plaintiffs in error complain that the trial court erred in excluding from the jury the record of the garnishment proceedings, whereby it was sought to prove that the notes had been paid. Upon an examination of the record, it appears that C. J. O'Connor, whose name appeared upon the back of said notes as indorser, indorsing the same to the Citizens Bank for collection, was not made a party to the garnishment proceedings. The notes show an indorsement in blank by John C. Sullivan, and also the indorsement, "Pay to Citizens Bank for return, C. J. O'Connor," and the protest attached thereto shows that the notice of protest was sent to John C. Sullivan at Hubbard, Nebraska, C. J. O'Connor at Homer, Nebraska, and to A. W. Padget at Bancroft, Nebraska. The fact that O'Connor apparently had an interest in these notes, would be apparent to the most casual observer when the garnishment proceedings were had. It would hardly seem necessary to say that O'Connor's claim of title to the notes could not be barred by garnishment proceedings to which he was not a party. The adjudication by the county court of Cuming county that the notes were the property of E. E. Sullivan, was an absolute nullity so far as O'Connor was concerned. The

record of the proceedings in garnishment was properly excluded by the court.

A more serious question, however, is presented by the action of the court in directing a verdict for the plaintiff. If the notes were based upon an illegal consideration, or upon a consideration a part of which was illegal, a defense sought to be made upon that ground between the original parties to the instrument would, if established, be a complete defense, and, if in the hands of any one but an innocent purchaser, the enforcement of the contract would be subject to the same infirmity. In the case at bar, Padget testifies that the notes were given in payment for a stock of liquors, for saloon fixtures and for the unexpired term of the license of E. E. Sullivan. That the agreement was that Sullivan should deliver possession of the saloon property and stock of liquors to Padget, and should allow Padget to run the saloon in Sullivan's name for six months, the length of time for which the license had been paid to the village of Bancroft. This testimony is uncontradicted. A license to sell liquor under the Slocumb law in this state is a personal privilege granted to the individual by the authorities, upon proof by him that he is possessed of certain qualifications, and in case he has not been guilty of certain prohibited acts. As a condition precedent to the issuance of the same, a petition praying the proper authorities to grant him a license must be presented, signed by a specific number of resident freeholders. One object of the law is to place it within the power of the resident freeholders of the ward or precinct to designate the individual whom they are willing should conduct the traffic in intoxicating liquors in their locality. The agreement between Sullivan and Padget, whereby Padget was to be allowed to conduct the liquor traffic under Sullivan's name for the unexpired term of Sullivan's license, was clearly an agreement to violate the laws of the state, and was illegal. A promissory note given with such an agreement as its sole consideration could not be enforced, and where, as in this case, the

illegal consideration forms a part of the whole consideration, the courts will not undertake to separate the legal from the illegal portions of the contract, but the whole consideration is tainted by the illegality of the part, and the contract will not be enforced.

"If any part of a consideration is illegal, the whole consideration is void; because public policy will not permit a party to enforce a promise which he has obtained by an illegal act or an illegal promise, although he may have connected with this act or promise another which is legal." 1 Parsons, Contracts, 457; Norton, Bills & Notes (2d ed.), 276; *Taylor & Co. v. Pickett*, 52 Ia. 467; *Wilde v. Wilde*, 37 Neb. 891; *Wilson v. Parrish*, 52 Neb. 6; *McCormick Harvesting Machine Co. v. Miller*, 54 Neb. 644; *McClelland v. Citizens Bank*, 60 Neb. 90. It is evident therefore that, if the illegality of part of the consideration be established, there could be no recovery upon these notes if the action had been brought by Sullivan against Padget and Foley. It becomes then a vital point in this case, whether or not the plaintiff, O'Connor, was entitled to the protection given by the law to an innocent purchaser of negotiable paper before maturity. As to this point, O'Connor's testimony in chief was to the effect that he was an innocent purchaser, but, upon cross-examination, it was developed that O'Connor had other dealings with the Sullivans; and the witness Keefe testified that O'Connor told him that he had not bought the notes, but that he had them for collection, and that he knew that the license was included in the consideration. There is a direct conflict in the testimony between these two witnesses. If O'Connor's testimony is to be believed, he was an innocent purchaser of the notes and should recover in this action. If Keefe's testimony is most credible, then O'Connor merely stood in the shoes of E. E. Sullivan, and the illegality of the consideration, if established, furnished a complete defense. Whether or not O'Connor was an innocent purchaser was a question of fact that should have been submitted to the jury. It is possible that, had the question

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been submitted to a jury, it might have found that the witness Keefe gave the true story of the conversation with O'Connor, and that O'Connor was not an innocent purchaser or *vice versa*. For the errors committed in sustaining the motion to direct a verdict for the plaintiff and in directing such verdict, we recommend that the cause be reversed and remanded for further proceedings.

DUFFIE and KIRKPATRICK, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is reversed and the cause remanded for further proceedings.

REVERSED.

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STATE OF NEBRASKA V. INSURANCE COMPANY OF NORTH AMERICA.\*

FILED MARCH 17, 1904. No. 13,470.

1. **Foreign Insurance Companies.** The state may impose on a foreign corporation, as a condition of coming into and doing business within its territory, any terms, conditions and restrictions it may think proper, not repugnant to fundamental laws.
2. ———: **LICENSE TAX: CONSTITUTIONAL LAW.** The provision of section 33, chapter 43, Compiled Statutes, entitled "An act regulating insurance companies," passed in 1873, declaring that, whenever the laws of another state shall require of insurance companies incorporated in this state the payment of taxes and license fees, or otherwise, greater than the amount required for such purposes from similar companies of other states by the then existing laws of this state, then all insurance companies of such states shall be required to pay for taxes and license fees an amount equal to the amount of such charges and payments imposed upon or required by the laws of such state of the companies of this state, is a valid exercise of legislative power in no way inhibited by the fundamental law of the state or of the nation.
3. **Reciprocal Tax.** The imposition of the reciprocal tax and license fees provided by said section 33 is a privilege or license tax imposed as one of the conditions upon which a company, subject

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\* Rehearing allowed. See opinions. pp. 335, 341, 348, *post*.

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to such tax or imposition, is admitted into this state, to engage in business herein.

4. **Constitutional Law.** The fact that the exaction may not be demanded in advance, and as a condition precedent to the entrance of the company into the state to do business, does not change or qualify the principle justifying the levying of such tax as one of the conditions for engaging in business in the state; and the laying of such burdens and the imposition of such tax and license fees in no way violates the provisions of section 1, article IX of our constitution.
5. ———: **FOREIGN CORPORATIONS.** The fact that the exactions provided by said section 33 are required only of those companies having their domicile in other states, the laws of which discriminate against outside companies, is neither arbitrary nor unreasonable classification, and does not contravene the second clause of said section of the constitution.
6. **Statutes: REPEAL BY IMPLICATION.** While repeals by implication are not favored, yet, where the later statute contains matter so repugnant to the earlier that both can not stand, the provisions of the earlier law must fall to the ground, and be deemed to have been repealed by implication by the later act.
7. ———: ———. When the legislature in the later act refers especially to a former act, and excepts from the operation of the last act a portion of the former, the inference is warrantable that there was an intention to repeal by implication inconsistent and repugnant provisions of the earlier statute not embraced within the terms of the exception clause.
8. ———: **CONSTRUCTION.** Where the words of a statute are so plain, specific, and unambiguous as to admit of no other construction, the meaning which the words import must be held conclusively presumed to be the meaning which the legislature intended.
9. **Taxation: CONSTITUTIONAL LAW.** The provision of section 38, article I, chapter 77, Compiled Statutes, 1901, exempting insurance companies from all taxation save as therein expressed, is, in so far as it purports to exempt personal property of insurance companies from taxation, a violation of section 1, article IX of the constitution, and as to the taxation of such property is of no force and effect.
10. **Repugnancy.** Ordinarily, a statute repugnant in some of its features to some constitutional provision will yield only to the extent of the repugnancy and no further.
11. **Statutes: VALIDITY.** Where the act eliminating the unconstitutional feature is complete in all respects, and capable of enforce-

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ment, it will be held valid and enforceable, except where the invalid portion was manifestly an inducement to the passage of the remainder.

12. —: REPEAL BY IMPLICATION. Section 33, chapter 77 of the revenue act of 1879, as amended in 1887, being repugnant and inconsistent with the reciprocal tax feature of section 33, chapter 43, passed in 1873, to the extent of such repugnancy and inconsistency, repeals the latter mentioned section by implication.

ACTION by the state against the Insurance Company of North America to recover taxes imposed by section 33, chapter 43, Compiled Statutes: *Demurrer to answer overruled and action dismissed.*

*Frank N. Prout, Attorney General, and Norris Brown,*  
for the state.

*Greene, Breckenridge & Kinsler, contra.*

HOLCOMB, C. J.

In 1873 the legislature passed a law relating to the business of insurance entitled "An act regulating insurance companies." Compiled Statutes, 1901, ch. 43. The law took effect and was in force from and after June first of that year. By section 32 of the act it was provided that certain fees therein enumerated should be paid by every company doing business in this state to which the act applied. These fees were for services by the state auditor for filing, and making an examination of the first application; issuing certificates of license; filing annual statements; issuing certificates of authority; for copying papers and certifying to the same, etc. Section 33 of the act is set forth in full in the following language:

"Whenever the existing or future laws of any other state of the United States shall require of insurance companies incorporated by or organized under the laws of this state, having agencies in such other state, or of the agents thereof, any deposit of securities in such state, for the protection of policy-holders, or otherwise, or any payment for taxes, fines, penalties, certificates of authority,



license fees, or otherwise, greater than the amount required for such purposes, from similar companies of other states, by the then existing laws of this state, then, and in every such case, all companies of such states establishing, or having theretofore established an agency or agencies in this state, shall be and are hereby required to make the same deposit, for a like purpose, with the auditor of this state, and to pay said auditor for taxes, fines, penalties, certificates of authority, license fees, or otherwise, an amount equal to the amount of such charges and payments imposed upon or required by the laws of such state, of the companies of this state, or the agents thereof."

In the case at bar, the state prosecutes an action to recover of the defendant insurance company, under the provisions of the section quoted, two per cent. of the amount of the gross premiums received by the defendant company in this state during the year 1902. The petition alleged, in substance, that while domestic insurance companies are by the laws of Pennsylvania, the domicile of the defendant, required to pay but eight mills on the dollar upon the amount of the gross premiums received, insurance companies of other states and countries are required to pay into the treasury of said state two per cent. on the amount of the gross premiums received by them respectively, and prays a recovery of a like percentage of the gross premiums collected in this state by virtue of the provisions of said section 33. By the answer filed, the validity of the section quoted and the legality of the demand made by the state are challenged on three different grounds. It is alleged that the attempted imposition of the amount sought to be collected is contrary to section 1, article IX of the constitution, providing for the levying of a tax by valuation and uniformity of taxation, and which section reads as follows:

"The legislature shall provide such revenue as may be needful, by levying a tax by valuation, so that every person and corporation shall pay a tax in proportion to the value of his, her or its property and franchises, the value

to be ascertained in such manner as the legislature shall direct, and it shall have power to tax peddlers, auctioneers, brokers, hawkers, commission merchants, showmen, jugglers, inn-keepers, liquor dealers, toll bridges, ferries, insurance, telegraph and express interests or business, venders of patents, in such manner as it shall direct by general law, uniform as to the class upon which it operates." It is also alleged that the section quoted is repealed by implication by the revenue law of 1879 (section 38, chapter 77, Compiled Statutes), and the amendatory section as enacted by the legislature in 1887. It is further alleged that the imposition of the tax sought to be collected is unauthorized, because no insurance company organized under the laws of Nebraska has ever had any agent or agency in the state of Pennsylvania, and has never been admitted to do business therein, and that companies created under the laws of Nebraska have never been able to comply with the laws of Pennsylvania with respect to the admission of insurance companies to transact business in said state. It is regarded as neither advisable nor proper to attempt a discussion or consideration of that part of the answer of the defendant last above referred to, and the same will not be further noticed in the further consideration of the case. The state has filed a demurrer to the answer of the defendant, raising thereby issues of law only in respect of the defenses interposed of which we have just made mention.

Section 33 of the act of 1873 may be euphemistically called by some a reciprocal provision in the insurance law; while counsel for defendant insists on its being more properly denominated by the more harsh appellation of a retaliatory measure. Whatever may be the proper designation of the act as to its nature and characteristics, such legislation seems to be generally regarded as eminently just and fair, and based upon acknowledged sound legal principles. Such an act asserts only the self-respect and dignity of a sovereign state, justly maintained in its business relations and dealings with other commonwealths.

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While extending comity and inviting friendly commercial intercourse, it demands reciprocal equality and fairness as a basis for such transactions. The state, while ready to acknowledge the courtesy due to sister states and the corporations created under their laws, insists that our own corporations, formed and fostered under the laws of this state, shall receive the same consideration and protection which this state accords to the corporations coming here from other states to engage in business within the limits of our own state. The principle justifying legislation of the character under consideration seems to be so firmly established, and with such unanimity of sentiment, as evidenced by the opinions of the courts of last resort in the many adjudicated cases elsewhere, that it seems unnecessary to engage in any extended discussion in its support. It is said by the supreme court of Indiana in *State v. Insurance Co. of North America* (the company here litigating), 115 Ind. 257, 265:

"The principle that a state may impose on a foreign corporation, as a condition of coming into or doing business within its territory, any terms, conditions and restrictions it may think proper, that are not repugnant to the constitution or laws of the United States, is firmly established by the decisions of the supreme court of the United States. *Bank of Augusta v. Earle*, 13 Pet. (U. S.) \*519; *Lafayette Ins. Co. v. French*, 18 How. (U. S.) 404; *Paul v. Virginia*, 8 Wall. (U. S.) 168; *Ducat v. Chicago*, 10 Wall. (U. S.) 410; *Doyle v. Continental Ins. Co.*, 94 U. S. 535."

The authority and power of a state, by proper legislation, to impose additional burdens and conditions upon an insurance company of another state, where the laws of the state of its creation discriminate in favor of such company and against those of other states and countries, such as is sought to be done by the provisions of section 33, heretofore quoted, are recognized, approved and upheld by the supreme court of the United States and the supreme courts of several of the different states of the Union. With but one exception, in so far as our investigation of the matter

has extended, all the courts which have been called upon to express themselves on the subject are of one mind in maintaining the validity of such legislation. *Philadelphia Fire Ass'n v. New York*, 119 U. S. 110; *People v. Fire Ass'n of Philadelphia*, 92 N. Y. 311; *Phoenix Ins. Co. v. Welch*, 29 Kan. 672; *State v. Fidelity & Casualty Co.*, 77 Ia. 648; *Germania Ins. Co. v. Swigert*, 128 Ill. 237, and *State v. Insurance Co. of North America*, *supra*. The exception mentioned is from the supreme court of Alabama, which holds such legislation to be a delegation of legislative power, and therefore invalid. Upon legal principles of general application and under the authorities cited, it can hardly be doubted that the enactment of the provisions of section 33, heretofore quoted, is clearly a constitutional exercise of legislative power in no way inhibited by the fundamental law of the state or the nation. Were it solely a question of the power of the legislature to provide for the reciprocal features found in the above mentioned section, we should not hesitate to declare there is no legal obstacle in the way of the state's recovery in the present action.

It is contended, however, by counsel for defendant that, while the legislature may have the power to levy a tax on foreign insurance companies by way of a license or privilege tax, such power has not been exercised by the provisions of section 33, and that the exaction therein provided for is purely a tax for revenue purposes, and the test of its validity is to be determined by the application of the same principles as those governing the levying and collection of a property tax. It is argued that the license fees, authorizing the defendant to do business in this state, are provided by section 32, of which mention has been made, and that the company having once entered the state to engage in business must then be placed upon the same plane as all other companies engaged in a like business, and that the enforcement of the tax sought to be recovered violates the rule of uniformity required by section 1, article IX of the constitution. We find ourselves unable to

accept this argument as convincing. It is, we think, the manifest intention of the legislature to provide for the exaction which is sought to be imposed herein as a privilege or license tax as one of the conditions on which the company is admitted into the state to engage in business herein. That is, the legislature has declared, that the company's right and authority to enter and engage in business in this state is dependent on its compliance with the provisions of section 32 as to the fees therein required to be paid as a condition precedent, and also compliance with the provisions of section 33, whenever those provisions become applicable. The provisions of the latter section are an additional burden and exaction to those contained in section 32 on those companies, only, upon which the section is intended to operate. It says to the corporation doing business in this state having its domicile in another state, the laws of which discriminate against those companies engaged in a like business therein from other states or countries, that, in addition to the general requirements as to fees and licenses under section 32, you must also meet the same extra burdens and exactions required by the laws of your home state of outside companies doing business therein. The principle justifying the provision is in no wise changed or qualified, by reason of the fact that the exaction may not be demanded in advance and as a condition precedent to entrance into the state. It is sufficient if it is one of the conditions imposed, not only as a right to enter the state, but to continue to do business herein. It is an obligation assumed and is a part of the conditions to be complied with for the privilege of engaging in business in the state, and may be enforced in any proper manner when the exaction becomes due. What is said by the supreme court of Indiana in *State v. Insurance Co. of North America*, *supra*, is here quite *apropos*. Say the court:

"Moneys which have or may become due to the state from any foreign insurance company, under the provisions of the retaliatory section of our statutes regulating foreign

insurance companies doing business in this state, are or will be due and payable as a part of the terms or conditions of its entering this state and transacting business within its limits. Such retaliatory section of our foreign insurance company statutes, therefore, is not within our constitutional restrictions in relation to taxation."

In relation to a tax upon the gross earnings of insurance companies doing business in this state which, on principle, is of the same nature as the imposition sought to be enforced in the case at bar, in the very recent case of *State v. Fleming*, 70 Neb. 523, it is said:

"Relating to the provisions of sections 59 and 60, it is plain that the tax of 2 per cent. upon the gross earnings of the companies mentioned in these sections is a tax imposed, not upon their property, but upon their privilege of doing business in this state."

Such a tax, say this court, is not in any sense a tax upon the property of these corporations, but a privilege tax and, as such, is wholly unobjectionable.

There remains to be considered another feature of the provisions of section 33 in this same connection. It is urged that the selection, for the purposes of the exactions of the nature sought to be imposed in the present case, of those companies only having their domicile in another state, the laws of which discriminate against outside companies, is an arbitrary and unreasonable classification, not at all warranted under the second clause of section 1, article IX of the constitution, and that, because of such attempt at arbitrary classification, the act can not stand. As it occurs to us, a sufficient answer to this contention is that, when the principle underlying the right to levy a tax or exaction such as we are discussing is admitted or is established, there is included in the proposition the idea of reasonableness, and an acknowledgment of the propriety of the classification. In order to make the operation of an act of this nature effective, there must be a classification both as to states and the character of the burden. The principle would be of no utility, and there

could be no practical application, unless the companies against which the act should operate might, by the legislature, be restricted to those states, only, and to the kinds of burdens and exactions imposed by the laws of each individual state whose laws, in respect to the same matter, render the reciprocal legislation proper and necessary to effectuate the desired purpose. The classification is not only wholly devoid of arbitrary features, but is founded upon considerations of the most reasonable kind and altogether appropriate to the object sought to be attained. Say the supreme court of Kansas, in *Phoenix Ins. Co. v. Welch*, *supra*:

"It matters not whether this charge upon the plaintiff is to be regarded in the nature of taxation, or a license. In neither case is it justly obnoxious to the charge of inequality in the sense that would make it unconstitutional. The legislature may classify for the purposes of taxation or license, and when the classification is in its nature not arbitrary, but just and fair, there can be no constitutional objection to it. \* \* \* Here foreign insurance corporations are classified by the state from which they come, and when we consider the purposes of such classification it can not be held that there is anything arbitrary or unjust therein."

The rule announced in *Rosenbloom v. State*, 64 Neb. 342, on the subject of classification under the second clause of section 1, article IX, obviously gives warrant for the views expressed herein regarding the same matter.

The more serious problem to consider and determine in disposing of the present case, as we view the subject, is regarding the contention that section 33, chapter 43, or at least that portion thereof referring to the imposition and enforcement of a reciprocal tax, such as is herein sought to be recovered, is repealed by the enactment of the general revenue law of 1879 known as chapter 77, article I, of the Compiled Statutes, 1901, and especially section 38 thereof. The act is entitled "An act to provide a system of revenue." It, in express terms, repeals "all acts and parts

of acts inconsistent with the provisions of this act." Section 38, as originally enacted, provided for a tax upon the gross amount of premiums received by insurance companies within the state, during the previous year, and declared that "Insurance companies shall be subject to no other taxation under the laws of this state, except taxes on real estate, and the fees imposed by the chapter on insurance." Relative to the contention that this section, as originally enacted, repeals by implication that part of section 33, chapter 43, now under consideration, we are prone to the belief that the word fees should not be given a narrow and technical meaning, as argued by counsel for defendant, but rather be accepted in its broad and most comprehensive meaning, which, in view of the rule that repeals by implication are not favored, would probably justify the construction that all license fees or taxes in the nature of a privilege to do business in this state, as contemplated by both sections 32 and 33, would be included within the exception mentioned, and come fairly within the meaning of the words except "fees imposed by the chapter on insurance." It is profitless, however, to discuss this phase of the subject, as nothing could be gained thereby save, possibly, the ascertainment of rights and obligations of a moral rather than of a legal character. In 1887, section 38, chapter 77, as originally enacted, was amended by the legislature, the amending act being entitled "An act to amend section thirty-eight of an act entitled 'An act to provide a system of revenue.'" The section as amended provided for the levying of a tax on the net amount of premiums received instead of the gross amount, as before provided for. The section as amended also declared that "Insurance companies shall be subject to no other tax, fees, or licenses under the laws of this state, except taxes on real estate and the fees imposed by section 32 of an act regulating insurance companies, passed February 25, 1873." It will be observed that, not only was the basis for levying a tax changed from the gross amount to the net amount of the premiums received,



but that also, in specific terms, it was declared that no other tax, fees, or licenses under the laws of the state should be exacted from such companies, except taxes on real estate and the fees imposed by section 32, only, of the act of 1873 regulating insurance companies. It is difficult to conceive of the use of more specific language which might be employed, with a view of prohibiting all other forms of taxation than the general tax provided by the amended section 38, chapter 77, and the fees imposed by section 32, chapter 43, being the act regulating insurance companies and passed in 1873. Judging from the language found in the amended section, it is difficult to escape the conclusion that the amendment was intended to, and necessarily did, have the effect of repealing by implication the provisions of section 33 of the act of 1873 under consideration. The two sections are so repugnant to each other that both can not stand. If the reciprocal tax sought to be collected in this action is now enforced, then, obviously, the company is subject to other taxes and fees, under the laws of this state, than a tax on premiums received, and taxes on real estate, and the fees imposed by section 32 of the act regulating insurance companies. It is manifest that, in the enactment of the revenue law of 1879 and especially the provisions found in section 38, the legislature had in mind the prior legislation affecting insurance companies, for the act of 1873 is specifically mentioned in the exception of the fees therein provided for, as not coming within the general exception of the laying of other taxes and impositions than those contemplated by section 38. As has been suggested, the exception in general terms of the fees provided for by the prior chapter on insurance, is probably susceptible of the construction that the reciprocal tax feature of section 33 of that chapter, as one of the conditions of an insurance company entering and engaging in business in this state, would come within the terms of the exception and would not be construed as being repealed by implication by the later act.

But, by the amendment of 1887 of section 38 of the

revenue act, the legislature has not only again referred to the prior chapter on insurance, but has gone to the extreme limit in the expression as to what fees provided for by that act shall come within the exception clause, and has said in words that need no explanation or construction that the fees provided for by section 32, only, of that chapter shall be exacted from the insurance companies doing business in this state, in addition to the taxes on premiums as provided by section 38 of the revenue act, and taxes on real estate. The maxim, *expressio unius est exclusio alterius*, would seem applicable, resulting in the warrantable inference that the legislature intended to exclude the reciprocal tax feature contained in section 33. Had there not been in section 38, as originally enacted or as amended, special reference to the prior chapter on insurance, but only an exception clause general in its character, we would, in construing such a statute, be warranted, perhaps, in saying that the exception referred only to taxes and impositions laid primarily for revenue purposes, and had no bearing on the chapter on insurance, because the chief object of the latter is regulation of the insurance business, rather than the raising of revenues. It may possibly be that the legislature did not fully appreciate the legal effect of the enactment of the amendment to section 38, but the thought suggests itself to one's mind that those especially interested in legislation favorable to insurance companies, who are usually in convenient calling distance with suggestions and advice during legislative sessions, by their shrewdness and *finesse*, have brought about a declaration by the legislature, in unmistakable terms, in the passage of the law which operates as a repeal by implication of the provisions of section 33 authorizing a reciprocal tax, as effectually as though the repeal was in express terms. The words in section 38 as amended are so plain, so specific, so unambiguous, that they admit of no other construction. The meaning which the words import must, we think, be held conclusively presumed to be the meaning which the legislature intended to convey; in other words,

the statute must be interpreted literally. "Even though the court should be convinced that some other meaning was really intended by the lawmaking power, and even though the literal interpretation should defeat the very purposes of the enactment, still the explicit declaration of the legislature is the law, and the courts must not depart from it." Black, *Interpretation of Laws*, ch. 3, sec. 26. *Stoppert v. Nierle*, 45 Neb. 105; *State v. Moore*, 45 Neb. 12; *Woodbury & Co. v. Berry*, 18 Ohio St. 456; *McCluskey v. Cromwell*, 11 N. Y. 593; *Doe v. Considine*, 6 Wall. (U. S.) 458. In an early case in this court, *People v. Weston*, 3 Neb. 312, in speaking of the repeal of statutes by implication, it is observed by Mr. Justice GANTT who wrote the opinion (p. 323) :

"In the case of the *Town of Ottawa v. La Salle*, 12 Ill. 339, it is said that 'it is a maxim in the construction of statutes that the law does not favor a repeal by implication. The earliest statute continues in force unless the two are clearly inconsistent with, and repugnant to each other, or unless in the latest statute some express notice is taken of the former, plainly indicating an intention to repeal it. And when two acts are simply repugnant, they should, if possible, be so construed that the later may not operate as a repeal of the former by implication.' Citing Dwarries, *Statutes*, 674; Bacon's Abridgment, title Stat. D; *Bowen v. Lease*, 5 Hill (N. Y.), 221; *Planters Bank v. State of Mississippi*, 6 Smed. & M. (Miss.) 628; *Hirn v. State of Ohio*, 1 Ohio St. 15.

In *State v. McCaig*, 8 Neb. 215, it is held that, where statutes or parts of the same statute are so repugnant to each other that both can not be executed, the latter is always deemed a repeal of the earlier. It is said in the opinion, quoting approvingly from *Brown v. County Commissioners*, 21 Pa. St. 37:

"Where two statutes are so flatly repugnant that both can not be executed, and we are obliged to choose between them, the later is always deemed a repeal of the earlier. This rule applies with equal force to a case of absolute

and irreconcilable conflict between different sections or parts of the same statute. The last words stand, and the others which can not stand with them go to the ground." See also *White v. City of Lincoln*, 5 Neb. 505, 514; *Lawsen v. Gibson*, 18 Neb. 137; *State v. Bemis*, 45 Neb. 724; *State v. Moore*, 48 Neb. 870; *State v. Magney*, 52 Neb. 508.

The attorney general, as we understand his presentation of the case, concedes that section 38, chapter 77, as amended does repeal by implication that part of section 33 under which a recovery is sought, if the amended section be held valid. But it is argued by him that such section is unconstitutional and, for that reason, can not have the effect of repealing section 33 of chapter 43 or any part thereof. It is urged in support of the contention, that the attempted legislation found in the original section and the amendment thereto is in direct violation of section 1, article IX of the constitution, providing for the raising of needful revenue by levying a tax by valuation, so that every person and corporation shall pay a tax in proportion to his, her or its property and franchises, and that, because personal property of insurance companies is attempted by this section to be exempted from taxation, the fundamental law is violated. We are quite well satisfied that the attempted exemption from taxation of personal property is in direct contravention of the fundamental law. But, if such be the case, does it necessarily or legally follow that the entire section must be held invalid? We think not. The rule ordinarily is that a statute repugnant to some constitutional provision will yield to the extent of the repugnancy and no further. *Scott v. Flowers*, 61 Neb. 620; *State v. Karr*, 64 Neb. 514; *State v. Fleming*, 70 Neb. 523. The principle deducible from these several cases is of peculiar force and special application to section 38. The act is complete in all respects and is capable of enforcement. The unconstitutional feature is of a negative rather than of a positive character. The exemption from other taxes can not extend to personal property without conflicting with con-

stitutional provisions. As a question of practical application and results the matter is of but little importance, because companies from other states maintaining agencies in this state usually have but little, if any, personal property subject to taxation. But the provision attempting to exempt personal property, as to such exemption, must yield to the superior law, and the personal property of the insurance company held to be assessable, wherever found, as is all other personal property. In so far as the section permits personal property to escape taxation, it must be held without legal force and effect, but otherwise it stands as a valid legislative enactment. The legal result would be that insurance companies must pay taxes on their personal property, on their real estate, on the net amount of premiums received, and must also pay the fees provided by section 32 of chapter 43, and that no other tax, fees or licenses under the laws of this state can be lawfully levied on such companies. The law being valid in all other respects and capable of enforcement, and, by its express terms, being utterly repugnant and inconsistent with the reciprocal tax feature of section 33, so that one or the other must fall, we are driven to the conclusion that section 38, as amended in 1887, repeals by implication that part of section 33 of the act of 1873 providing for the exaction which is sought to be enforced in the case at bar. The answer in respect of this phase of the case states a good defense and, for the reasons given, the demurrer thereto should be overruled and judgment entered dismissing the action, which is accordingly done.

DISMISSED.

The following opinion on rehearing was filed June 30, 1904. *Demurrer to answer sustained:*

1. **Statute: VALIDITY.** Where a part of an act is unconstitutional, because contravening some provision of the fundamental law, the language found in the invalid portion of the act can have no legal force or efficacy for any purpose whatever.

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2. ———: **REPEAL BY IMPLICATION.** That part of the revenue act (Compiled Statutes 1901, ch. 77, art. I, sec. 38), providing "Insurance companies shall be subject to no other tax, fees, or licenses under the laws of this state, except taxes on real estate and the fees imposed by section 32 of an act regulating insurance companies, passed February 25, 1873," being unconstitutional because attempting to exempt insurance companies from the payment of taxes on personal property, is void and of no effect for any purpose, and can not, therefore, operate as a repeal by implication of the provisions of section 33, chapter 43, Compiled Statutes, or any portion thereof.
3. **Insurance Companies: TAXATION.** The fact that a less reserve fund is required of domestic companies organized under the laws of this state, than is required of all companies doing business in the state of Pennsylvania under its laws, does not militate against the enforcement of the provisions of the reciprocal tax law on companies organized under the laws of Pennsylvania, and doing business in this state, such reciprocal tax law being otherwise applicable and enforceable.
4. **Reciprocal Tax Law.** The provisions of said section 33, chapter 43, Compiled Statutes, for a reciprocal tax on insurance companies organized under the laws of other states, whose laws discriminate against insurance companies organized under the laws of the state of Nebraska, apply and become operative from the time of the enactment of such laws by such other states requiring companies of this state to make deposits, or pay fines, taxes, penalties or license fees not required of all other companies, whether any company of this state shall have established agencies there or not.
5. ———. The act mentioned is in force and effect, and requires a foreign insurance company doing business in this state to pay the same license fees, etc., required by the laws of the foreign state of companies of this state doing business therein, whenever the existing or future law of such other state shall require companies of this state to pay license fees, etc., for the privilege of doing an insurance business therein.

HOLCOMB, C. J.

Section 38, article I, chapter 77 of the revenue law, as it existed prior to the 1903 enactment, provided that every insurance company transacting business in this state should be taxed upon the excess of premiums received over losses and ordinary expenses incurred within the state, during the year previous, and at the same rate that

all other personal property is taxed. The section closed as follows:

"Insurance companies shall be subject to no other tax, fees or licenses under the laws of this state, except taxes on real estate and the fees imposed by section 32 of an act regulating insurance companies, passed February 25, 1873."

In the opinion handed down in this case, it is held that the provision quoted, in so far as it purported to exempt insurance companies from the payment of taxes on personal property, is in contravention of section 1, article IX of the constitution, providing for the raising of needful revenues, by levying a tax by valuation, so that every person and corporation shall pay a tax in proportion to his, her or its property and franchises, and it is also held that, notwithstanding the unconstitutional feature referred to, yet, the section as a whole would yield only to the extent of the repugnancy, and otherwise would be enforceable, and that the effect of the part of the section quoted, notwithstanding its invalidity in so far as it attempted to exempt personal property from taxation, was to repeal by implication the reciprocal tax feature found in section 33, chapter 43, Compiled Statutes. In arriving at the conclusion announced in the former opinion, the mind of the writer was centered especially on the exception clause contained in the sentence wherein certain exactions were excepted from the exemption generally of all other forms of taxation or other exactions; and, by applying the familiar rule that a statute will yield only to the extent of the repugnancy, it was believed that the legal effect was to add personal property to the exception clause, and that the section otherwise would remain a valid enactment and operate as a repeal by implication, as therein announced. Further consideration of the matter leads to the conclusion that the latter provisions of the section referred to, eliminating the unconstitutional part, were incorrectly construed. We are satisfied with the holding that the purported exemption of personal

property from taxes is an unconstitutional exercise of legislative power. We think there can be no doubt but that the attempted exemption of personal property from taxation contravenes the fundamental law, and that the section of the revenue act, in so far as it purports to do this, is invalid. *State v. Poynter*, 59 Neb. 417. We were, we think, in error in holding to the view that the section in this respect was invalid, and at the same time that it operated as a repeal by implication of the reciprocal tax provision of section 33 of the act of 1873. The effective words of the section, those which contravene the fundamental law and which must be held unconstitutional, are found in the clause, "Insurance companies shall be subject to no other tax, fees or licenses, under the laws of this state." These are the words which purport to exempt insurance companies from taxation on their personal property. Such attempted exemption is invalid, as was held in the former opinion. The legislature can not, after providing for a tax on net receipts, say that insurance companies shall be subject to no other tax, under the laws of this state. This language is as repugnant to the constitution as would be the case if no exception were made regarding taxes on real estate. Personal property can not be exempted any more than real estate, nor can both together. The words found in the invalid portion of the section, those which declare that insurance companies shall be subject to no other tax, fees or licenses, under the laws of this state, are the only words which can effectuate a repeal by implication of the reciprocal tax feature of section 33 of the act of 1873. No language can be found which can be appealed to as repealing by implication the provisions of the act under which a recovery is sought in this case, except the language of section 38 quoted, and that which we say is inimical to the constitution. That part of the act, therefore, which attempts to relieve insurance companies from other taxes, fees and licenses than those mentioned, being void, for the reasons stated, is void for all purposes, and as though it had never been enacted



by the legislature, and therefore has no legal force and efficacy for any purpose. *Boales v. Ferguson*, 55 Neb. 565. Such being the case, there is no repeal by implication of any part of section 33, chapter 43 of the laws of 1873, and the former opinion holding to the contrary is therefore disapproved.

Having reached the conclusion just announced, it becomes necessary to consider one further point in the case, which was only mentioned, but not discussed or passed on in the former opinion. It is contended by counsel for the defense that the retaliatory law of this state can not be enforced against the defendant, a company incorporated under the laws of Pennsylvania, because no Nebraska company is incorporated, or can be incorporated, pursuant to the laws of this state, which does or can conform to the requirements made by the state of Pennsylvania of all insurance companies doing business therein. The argument in support of the proposition is predicated on the theory that a larger reserve is required of fire insurance companies doing business in Pennsylvania, by the laws of that state, than is required by companies organized and doing business under the laws of this state. It is said, companies created under the laws of this state do not maintain any such reserve, and are required to keep only a less percentage of their premiums, and that they may pay out the excess in dividends without violating any provisions of law. There is nothing in the argument which even remotely suggests the inability of Nebraska companies to fully, and in all respects, comply with the law and requirements of the state of Pennsylvania. The fact that they may operate upon a different plan or with a smaller reserve, under the laws of this state, than is required by the state of Pennsylvania, does not argue that they can not and do not measure up to the standard set by the laws of the latter state, and may not enter into that state, and engage in business therein, along with the domestic companies, or those organized under the laws of other states. If all are on common ground, in a fair field, with

no favors, there is no tenable ground for saying that Nebraska companies have not the ability to successfully compete with all others. If our companies do not engage in business in Pennsylvania, it may fairly be inferred that it is because of discrimination against outside companies, and not on account of the provisions of law, equally applicable to all companies, which may in some respects differ from the laws governing their creation and authority to do business in their home state. We may assume that the sole reason no Nebraska companies are doing business in Pennsylvania, if such be the case, is because of the severity of the restrictions imposed by the laws of Pennsylvania upon insurance companies organized under the laws of other states, which are not applicable to domestic companies. *Germania Ins. Co. v. Swigert*, 128 Ill. 237; *Phoenix Ins. Co. v. Welch*, 29 Kan. 672, and *State v. Fidelity & Casualty Co.*, 77 Ia. 648, all support the right of enforcement of the reciprocal tax law, regardless of the question of the establishment of an agency, or the attempt to do business, in the state against whose companies the law is made to operate. The law is effective when conditions it provides for are existent. If the laws of Pennsylvania are such as were contemplated by the legislature in the enactment of section 33, then those provisions are at once operative upon companies seeking to do business in the state, which are incorporated under the laws of that state, whether or not Nebraska companies have agencies established in Pennsylvania or whether, under the laws of this state, they may do business on a plan different from all companies doing business in Pennsylvania. In *Germania Ins. Co. v. Swigert*, *supra*, it is held, under a law in all essential features the same as the one under consideration, that the provisions of such a law apply, and become operative, from the time of the enactment of such laws, by other states, requiring companies of this state to make deposits or pay fines, taxes, penalties or license fees, whether any company of this state shall have established agencies there, or not. It is also held that such a

law is operative and in force, and requires a foreign insurance company, doing business in this state, to pay the same license fees, etc., required by the laws of the foreign state of companies of this state doing business therein, whenever the existing or future law of any other state shall require companies of this state to pay license fees, etc., for the privilege of doing an insurance business therein. The other authorities cited fully support the Illinois case. The former judgment overruling the demurrer to the answer is vacated, and the demurrer is sustained. Judgment will be entered in conformity therewith.

JUDGMENT ACCORDINGLY.

The following opinions on motion for rehearing were filed March 23, 1905. *Rehearing denied:*

The judgment heretofore entered in this cause adhered to.

HOLCOMB, C. J.

It is contended that the reciprocal tax law is repealed by implication. If the law is in fact repealed by implication, it must be upon the ground that another valid law exists, the enforcement of which is necessarily so inconsistent and repugnant as that both laws can not stand; the former, in such a case, being held to be by implication repealed. This method of repealing is not, of course, favored by the courts, and such a repeal is never effected, save there is a subsequent valid enactment wholly repugnant to the older law. If there is no valid law, there can be no repeal, and no law can be held to effect a repeal by implication where it has no other purpose to subserve than that of repealing the prior enactment. That can only be accomplished by an express repealing statute. The act (Compiled Statutes, 1901, ch. 77, art. I, sec. 38) providing for taxing the net premiums of insurance companies says: "Insurance companies shall be subject to no other tax, fees or licenses, under the laws of this state." The

clause is followed by some exceptions, which need not be noted. Now if this clause is valid, of course it operates as a repeal by implication because its enforcement is utterly repugnant to the law providing for a reciprocal tax; if, however, it is unconstitutional because of its attempted exemption of personal property, then it can not be effective as a repeal by implication, because it would serve no purpose save as an express repeal of a prior statute. I find no authority which, as it seems to me, would justify the conclusion that, although the clause is unconstitutional in so far as it attempts to exempt personal property from tax, yet is valid for the purpose of effectuating a repeal by implication. The case is not the same as it would be were there some other property generally subject to taxes, but which the legislature might lawfully exempt.

The question is not of exemption of property that might be exempted, but of repeal by implication of an otherwise valid and enforceable statute. When this court said that an unconstitutional act is as ineffectual as though it had never been passed (*Boales v. Ferguson*, 55 Neb. 565), it stated what I conceive to be a truism, applicable to every word and syllable of an act held unconstitutional, whether it be a section, a part of a section, a sentence or a clause, which is found by the court to be in conflict with some higher law. What the courts have said in the way of what may be termed modifications, qualifications or exceptions to the rule, does not lessen the force of the proposition. An unconstitutional law is for all purposes as though it had never been passed. *Finders v. Bodle*, 58 Neb. 57. An Ohio case, *Treasurer of Fayette County v. Peoples & Drivers Bank*, 47 Ohio St. 503, 10 L. R. A. 196, holds that one part of a section may be void without affecting the validity of the remainder, unless both parts are so interwoven as to be inseparable. This is but an extension of the rule that one section may be upheld and another condemned. The point is not whether the parts are contained in the same section—for the distribution into sec-

tions is purely artificial—but whether they are essentially and inseparably connected in substance. This case distinctly recognizes the rule that a part, when it falls, falls for all purposes, and that another part may be held to be valid. A Utah case, *Konold v. Rio Grande W. R. Co.*, 16 Utah, 151, in terms, recognizes the rule that, when a part of an act is void, it can have no validity for any purpose.

“Obviously,” say the court, “the provisions of this section are directly opposed to those of the constitution \* \* \* and therefore can not have the force of law, and are void. \* \* \* For like reasons, section 3197, relating to change of venue, is void, and ineffectual for any purpose.”

And in *Steed v. Harvey*, 18 Utah, 367, 72 Am. St. Rep. 789, the rule that a part of an act, or of the same section, not dependent on another, may be held void, and the other valid, is recognized; but the same provision or section can not be held both void and valid. It seems to me that this undoubtedly announces the only rule that could be adopted with any degree of safety, or which could be intelligently applied in all cases where the question of the validity of a statute and its effect are to be considered and determined. In a United States supreme court case, *Supervisors v. Stanley*, 105 U. S. 305, a state statute on the assessment of the shares of bank stock conflicted in part with the United States statute authorizing deduction of debts, where that was the general rule in the state as to all other personal taxable property. The court held that the state statute was valid up to the point where it came in conflict with the congressional act, and that the taxation of bank stocks, without the allowance of deduction of debts, would render the taxes levied invalid only in so far as the tax debtor was entitled to deductions by virtue of the provisions of the act of congress. This, as I understand the case, is by the application of principles similar to those applied in the case of *Scott v. Flowers*, 61 Neb. 620, or to those sometimes applied to the taxation of the business of a corporation engaged in intrastate and interstate business, and the act is held to be valid so far as it affects

intrastate business, but not of force and effect as to interstate business. The court say, in *Supervisors v. Stanley*, 105 U. S. 305:

"In other words, in such a case, so much of the law as conflicts with the act of congress in the given case is held invalid, and that part of the state law which is in accord with the act of congress is held to be the measure of his (the stockholder's) liability. There is no difficulty here in drawing the line between those cases to which the statute does not apply and those to which it does, between the cases in which it violates the act of congress and those in which it does not. There is, therefore, no necessity of holding the statute void as to all taxation of national bank shares, when the cases in which it is invalid can be readily ascertained on presentation of the facts. It follows that the assessors were not without authority to assess national bank shares; that where no debts of the owners existed to be deducted the assessment was valid, and the tax paid under it a valid tax. That in cases where there did exist such indebtedness, which ought to be deducted, the assessment was voidable but not void."

In other words, the statute could be given a constitutional construction in that it permitted the assessment of shares where no debts were to be deducted, and this construction was given in preference to one holding it wholly unconstitutional. In *Poindexter v. Greenhow*, 114 U. S. 270, the new act was held to be absolutely void, and of no effect, as to the right of certain parties holding bonds of the state to pay taxes by surrender of coupons for interest, as this would amount to the impairment of the obligation of a contract, otherwise the law was valid and enforceable. By the application of the same principle, we might, perhaps, if it were found necessary to uphold the law, construe the statute applying to deficiency judgments as being applicable only to contracts entered into after the passage of the deficiency judgment law. This same rule seems to be applied in *Commonwealth v. Gagne*, 153 Mass. 205, 10 L. R. A. 442.

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I think the second opinion in the case at bar announces the correct rule, and that the motion for rehearing should be overruled.

**REHEARING DENIED.**

**BARNES, J., concurring.**

The only question in this case is, whether or not the act of 1887, providing for a tax upon the net premiums of insurance companies, repeals so much of the insurance law of 1873 as provides for what is commonly called "The reciprocal tax."

An examination of our legislation affecting this question shows that the law relating to insurance companies, above mentioned, was passed at the legislative session of 1873, and has remained substantially the same from that day to this. Further examination discloses that when the general revenue law of 1879 was enacted it contained a section, to wit, section 38, almost identical in form and substance with the act of 1873, above mentioned, except that it provided for taxing insurance companies upon their gross premiums instead of their net premiums. In the act of 1879 it was provided:

"Insurance companies shall be subject to no other taxation, under the laws of this state, except taxes on real estate, and the fees imposed by the chapter on insurance."

Under this law, which was in force from the time of its enactment until 1887, no claim was ever made that the clause, above quoted, repealed the reciprocal tax law, either directly or by implication. On the contrary, the reciprocal tax was collected from, and paid by, all foreign insurance companies doing business in this state subject to taxation under the terms thereof, without objection. The act of 1887 (ch. 77, sec. 38), however, contains the following:

"Insurance companies shall be subject to no other tax, fees or licenses, under the laws of this state, except taxes on real estate, and the fees imposed by section 32 of an act

regulating insurance companies, passed February 25, 1873."

It will be observed that there is a slight difference in the wording of the two provisions, but they are in substance much the same. To me it seems quite doubtful if the legislature intended to change that part of the law relating to the reciprocal tax. Without doubt it was the intention of the lawmakers not to interfere with the operation of that law at all.

It is contended, however, that the clause in the law of 1887, last above quoted, repeals the reciprocal tax law, known as section 33 of the Compiled Statutes, relating to insurance companies. The repealing clause found in section 2 of the act of 1887 does not repeal section 33 of the statutes relating to insurance companies, in express terms; so, if that section is repealed at all thereby, it is by implication, and because it is in direct conflict with the clause last above quoted. Nothing else in the act of 1887 can be construed to affect the reciprocal tax law in any manner whatever. It is our unanimous opinion that so much of the last mentioned act as is quoted above is unconstitutional and void, because it exempts insurance companies from taxation on their personal property. It follows, then, that this clause falls to the ground, it goes out of the statute, and the law stands the same as though it had never existed, and had never been passed by the legislature, for any purpose. Conceding now the correctness of the view that the first clause of the act of 1887, which provides for taxing insurance companies upon their net premiums, is good and can be enforced, and must therefore stand, it by no means follows that the act operates to repeal the reciprocal tax law. That part of the act relating to the taxation of insurance companies upon their net premiums does not conflict with the reciprocal tax law in any manner whatever; and there has been no suggestion that both of these laws can not stand and be enforced together. We have, then, the proposition that the clause of the act which may be held to be valid is not in



conflict with, and therefore does not repeal, the reciprocal tax law by implication or otherwise. And that portion of the statute which, if valid, might have that effect, being unconstitutional and void, and discarded and rejected for every and all purposes, the reciprocal tax law is in no wise affected thereby. See laws of 1873, p. 443; laws of 1879, p. 291, section 38; laws of 1887, p. 569.

SEDGWICK, J., dissenting.

Section 38 of the revenue law, referred to in the opinion, required insurance companies to be taxed upon the premiums received by them in excess of the losses and ordinary expenses, and provided that this taxation should be in lieu of all other taxes, except taxes on real estate. This provision, if entirely valid, would relieve insurance companies from the reciprocal tax, so called, which this action was brought to enforce against this defendant, and would also relieve them from taxation upon their personal property. These companies could not be relieved from taxation upon their personal property, because of the requirement of the constitution that every person and corporation shall pay a tax in proportion to the value of his, her or its property. The tax upon premiums provided for by the statute is held valid and enforced, and the opinion discloses that the provision of this statute doing away with the reciprocal tax, on account of the new tax imposed upon premiums, would be valid, if it were not for the fact that the same clause of the statute also attempts to relieve the personal property of these companies from taxation. It does not seem to be in harmony with reason or authority to hold that a sentence or clause of a statute which attempts to accomplish several distinct purposes must be held to be unconstitutional, *in toto*, because some one of the several things sought to be accomplished is beyond the power of the legislature. Exempting insurance companies from taxation upon their personal property was not an inducement to this legislation or to any part of it.

Taxation upon premiums was the inducement to the exemption from other taxation. If this new taxation was sufficient ground for all of the exemptions allowed in consequence thereof, there seems to be no reason for denying to the legislature the power to make such of the exemptions provided for as are not forbidden by the constitution. It has been held:

"A law which is unconstitutional within certain limitations, if in terms it exceeds or fails to notice those limitations, may yet be entirely operative within its legitimate sphere, and properly held to have the application which thus confines it." *Commonwealth v. Gagne*, 153 Mass. 205, 10 L. R. A. 442. *Poindexter v. Greenhow*, 114 U. S. 270, 29 L. ed. 185; *Board of Supervisors v. Stanley*, 105 U. S. 305, 26 L. ed. 1044; *Treasurer of Fayette County v. Peoples & Drovers Bank*, 47 Ohio St. 503, 10 L. R. A. 196, and notes. *Steed v. Harrey*, 18 Utah. 367, seems to hold a contrary doctrine, but no satisfactory reason for such holding is given.

The conclusion reached in the opinion does not seem to me to be well supported by the reasons given. It may be that it can be supported upon other grounds. At all events the case has already been twice argued, and as the majority of the court are satisfied that no different result could be reached upon further consideration of the case, a further hearing does not seem advisable.

The following opinion on motion of state for judgment on the pleadings was filed February 8, 1906. *Motion sustained*:

1. **Courts: CONSTRUCTION OF FEDERAL CONSTITUTION.** The state courts are bound by the decisions of the United States supreme court regarding the proper construction of a clause of the federal constitution and its application to the question involved in the litigation.
2. **Insurance: INTERSTATE COMMERCE.** The business of insurance is not commerce, and the making of a contract of insurance is a

mere incident of commercial intercourse in which there is no difference whatever between insurance against fire, insurance against the perils of the sea, or insurance of life. *New York Ins. Co. v. Cravens*, 178 U. S. 389.

LETTON, J.

This cause was argued and submitted to the court while Chief Justice HOLCOMB presided. Before his term of office expired he prepared the following opinion, which meets with our approval, and which expresses our views with clearness and perspicuity:

"This cause is submitted on the petition of the plaintiff, the state, the second amended and substituted answer of the defendant, and a motion filed by the state for judgment on the pleadings. The court has heretofore considered and decided the principal legal questions arising in this controversy on a ruling on a demurrer interposed by the state to the answer of the defendant. *State v. Insurance Co. of North America*, ante p. 335.

"Nothing new or essentially different from the questions already passed upon is presented by the defendant's second amended and substituted answer except that it is now alleged that the defendant's business of insurance of property against loss by fire, as conducted and carried on between it and the citizens of the different states of the Union with whom it contracts for indemnity, is interstate commerce within the meaning of the clause of the constitution of the United States concerning the regulation of commerce between the different states of the Union and the citizens thereof; that the tax sought to be enforced by the state in this action constitutes a direct imposition upon the insurance business of the defendant, and that the section of the statute of this state authorizing the exaction sought to be enforced amounts to a regulation of commerce among the states and of the instrumentalities enjoyed therein; in violation of clause 3, section 8, article I of the constitution of the United States. The question thus presented pertains to the construction of the federal

constitution and regarding which the ultimate and final decision rests with the United States supreme court.

"It is plausibly argued that the vast business of fire insurance, carried on, as it is, by the different companies and corporations of many of the states with the citizens of all the states of the Union, is so vital and interwoven with our industrial and commercial fabric that it is essential to the welfare, success and permanence of our institutions, and is in its nature a commodity, in the exchange of which the business should be properly classed as interstate commerce, entitled to the protection and coming within the provision of the clause of the federal constitution to which reference has been made. Without taking the time to engage in a discussion of the question as an original proposition to be decided upon a course of reasoning and logic based upon underlying principles, and under the rules pertaining to the proper construction of provisions found in the fundamental law of the land, we must content ourselves by saying that the question can hardly be regarded as an open one, and that we feel ourselves bound by the decisions of the highest judicial tribunal, whose special and peculiar function it is to construe a clause of the constitution of the kind and character under consideration, and apply it to questions of litigation as they may arise. It is not for us to ignore or seek to overturn the authoritative utterances of that august body, but rather to remand to it the question of whether its own opinions shall be approved and followed, or overruled, because upon further consideration they are believed to be erroneous or unsound.

"In *New York Fire Ins. Co. v. Cravens*, 178 U. S. 389, decided in 1900, by a unanimous court, it is held that 'The business of insurance is not commerce, and the making of a contract of insurance is a mere incident of commercial intercourse in which there is no difference whatever between insurance against fire, insurance against the perils of the sea, or insurance of life.' In the opinion, after discussing and affirming the power of the state to

regulate in the manner attempted, as shown herein, it is by the court said: 'Further comment on this head may not be necessary, and we only continue the discussion in deference to the insistence of counsel upon the interstate character of the policy in suit. It is the basis of every division of their argument, and an immunity from control is based upon it for plaintiff in error, which, it seems to be conceded, the state can exert over corporations of its own creation. An interstate character is claimed for the policy, as we understand the argument, because plaintiff in error is a New York corporation and the insured was a citizen of Missouri, and because, further, the plaintiff in error did business in other states and countries.' And further it is observed: 'Is the statute an attempted regulation of commerce between the states? In other words, is mutual life insurance commerce between the states? That the business of fire insurance is not interstate commerce is decided in *Paul v. Virginia*, 8 Wall. (U. S.) 168; *Liverpool Ins. Co. v. Massachusetts*, 10 Wall. (U. S.) 566; *Philadelphia Fire Ass'n v. New York*, 119 U. S. 110. That the business of marine insurance is not, is decided in *Hooper v. California*, 155 U. S. 648. In the latter case it is said that the contention that it is, "involves an erroneous conception of what constitutes interstate commerce." We omit the reasoning by which that is demonstrated, and will only repeat, "the business of insurance is not commerce. The contract of insurance is not an instrumentality of commerce. The making of such a contract is a mere incident of commercial intercourse, and in this respect there is no difference whatever between insurance against fire and insurance against the 'perils of the sea.'" And we add, or against the uncertainty of man's mortality.'

"*Hooper v. California*, *supra*, fully supports the later case of *New York Life Ins. Co. v. Cravens*. In *Paul v. Virginia* it is said by Mr. Justice Field, speaking for the court: 'Issuing a policy of insurance is not a transaction of commerce. The policies are simple contracts of

indemnity against loss by fire, entered into between the corporations and the assured, for a consideration paid by the latter. These contracts are not articles of commerce in any proper meaning of the word. They are not subjects of trade and barter offered in the market as something having an existence and value independent of the parties to them. They are not commodities to be shipped or forwarded from one state to another, and there put up for sale. They are like other personal contracts between parties which are completed by their signature and the transfer of the consideration. Such contracts are not interstate transactions, though the parties may be domiciled in different states. The policies do not take effect—are not executed contracts—until delivered by the agent in Virginia. They are, then, local transactions, and are governed by the local law. They do not constitute a part of the commerce between the states any more than a contract for the purchase and sale of goods in Virginia by a citizen of New York whilst in Virginia would constitute a portion of such commerce.'

"In *Crutcher v. Kentucky*, 141 U. S. 47, the question for decision was with reference to the validity of a state statute having for its object the regulation of agencies of foreign express companies, and it is held that the statute was a regulation of interstate commerce, so far as applied to corporations of another state engaged in that business, and was to that extent repugnant to the constitution of the United States. A consideration and comparison of the case last cited, with *Hooper v. California*, *supra*, will make clear and emphasize the holdings of the United States supreme court on the question of the conduct of the business of insurance not being of a character which brings it within the scope of the commerce clause of the constitution. In both cases, agents of the foreign corporations had been fined in the state courts, for doing business contrary to the provisions of the state statutes seeking to regulate the business of foreign corporations. Each of the statutes had been upheld in the state courts.

In the *Hooper* case the statute affected foreign insurance companies, while in the *Crutcher* case it was directed against foreign express companies. The principal question in each case argued on appeal to the federal supreme court was, whether the statute under which the conviction was had contravened the provision of the federal constitution with reference to the regulation of interstate commerce. In the *Hooper* case the decision of the state court was affirmed on the ground, distinctly stated, that the business of insurance carried on by a foreign corporation in the state of California did not involve interstate commerce and the state statute was therefore valid; while in the *Crutcher* case the decision of the state court was reversed for the sole and only reason that express companies were engaged in interstate commerce, and the law seeking to regulate the business of such companies came in conflict with the commerce clause of the federal constitution. In the *Crutcher* case, in pointing out the distinction between the making of contracts of insurance and interstate commerce, or the necessary instrumentalities thereof, it is said: 'The case is entirely different from that of foreign corporations seeking to do a business which does not belong to the regulating power of congress. The insurance business, for example, can not be carried on in a state by a foreign corporation without complying with all the conditions imposed by the legislation of that state. So with regard to manufacturing corporations, and all other corporations whose business is of a local and domestic nature, which would include express companies whose business is confined to points and places wholly within the state. The cases to this effect are numerous.'

"With these clear and explicit expressions as to the proper construction of the clause of the constitution appealed to by the defendant in the case at bar, as it applies to the business of insurance, our duty appears reasonably plain, and we must hold to the view that the answer, in respect to the matter being discussed,

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states no defense to the cause of action pleaded by the plaintiff."

With these views we are content, and for the reasons therein stated the plaintiff is entitled to judgment on its motion, and it is accordingly so ordered.

Judgment for plaintiff will be entered for the sum prayed for in its petition.

**JUDGMENT FOR PLAINTIFF.**

**SEDGWICK, C. J., dissents.**

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**JOSEPH W. WOODROUGH V. DOUGLAS COUNTY ET AL.**

FILED MARCH 17, 1904. No. 13,594.

1. **Taxation. CONSTITUTIONAL LAW.** The sale of real estate for the payment of delinquent taxes, under the provisions of chapter 75 of the laws of 1903, entitled "An act to enforce the payment and collection of delinquent taxes and special assessments on real property," does not deprive the owner of his property without due process of law.
2. **Tax Sale: COUNTY AS PURCHASER.** Lands purchased by the county, under the provisions of this act, are held in trust for itself, the state, and all other political subdivisions entitled to any portion of such delinquent taxes. Such lands are not acquired by the state by escheat or forfeiture, and do not belong to the permanent school fund.
3. **Constitutional Law: JURY.** The proceeding provided for by this act is a suit in equity in the district court, and the owner of real estate in question therein, has no constitutional right to a jury trial.
4. ———: **RELEASE OF TAXES.** The sale of lands in such proceedings for what they will bring, though less than the amount of the decree for the taxes due and delinquent, is not a release or commutation of taxes, within the meaning of section 4, article IX of the constitution.
5. ———: **STATUTES.** The act is not vulnerable to the objection that its provisions are broader than its title; it is complete in itself, capable of enforcement, and is not open to the objection that it is amendatory of other laws.
6. ———: **DELEGATION OF LEGISLATIVE AUTHORITY.** The law provides for one of two methods of collecting delinquent taxes on real estate, and permits the county board to choose which method it will



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pursue. This does not amount to a delegation of legislative authority.

7. **Cumulative Remedy.** The remedy provided for is declared by the act itself to be cumulative, and therefore it is not in conflict with, nor does it take away any other remedy provided by statute.
8. **Act Constitutional.** *Held,* That the act in question is not in conflict with any of the provisions of the constitution so as to invalidate it, and is a constitutional exercise of legislative power.

ORIGINAL action by Joseph W. Woodrough against Douglas county and others. *Dismissed.*

*Joseph W. Woodrough, pro se.*

*Carl C. Wright, James E. English and W. T. Nelson, contra.*

BARNES, J.

The plaintiff commenced this action against the county of Douglas, its board of commissioners, the treasurer of said county, and the city of Omaha, to restrain the officers of the county and city from taking the proper and necessary steps to enforce the payment and collection of the delinquent taxes and special assessments on real property, in said county and city, under the provisions of chapter 75 of the laws of 1903. The defendants have filed separate demurrers to the plaintiff's petition. No objection is raised to our jurisdiction to entertain this suit, and it is conceded that the pleadings are sufficient in form and substance to test the validity and constitutionality of the law. The act contains 48 sections, and on account of its considerable length can not be quoted in full. Its provisions will be referred to in detail as occasion may require. Its objects, briefly stated, are: To clear the tax list of dead properties overburdened with taxes; to do this in such a way as to secure to the state, county and city all that the property will bring at a judicial sale made under the most favorable conditions; to litigate the questions involved as to the validity of the taxes and special assessments before instead of after the sale; to eliminate unnecessary items of cost, and allow the court

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proceedings to be carried on at a trifling expense; and to secure to the purchaser at the sale a new and independent title to the real estate in question. Section 5 of the act provides, in substance, that the county treasurer shall prepare a petition addressed to the district court of his county, which shall be entitled "The state of Nebraska, plaintiff, against the several parcels of land therein described and all persons and corporations having or claiming any right, title or interest therein, defendants." It also prescribes the allegations which the petition shall contain, together with the prayer for judgment. Section 6 provides that the petition shall be filed with the clerk of the district court in the county where the lands are located, and the cause shall be docketed as a suit in equity; that the filing of the petition shall operate as the commencement of a several action against each parcel of real estate described in the petition, as well as the party having or claiming any interest, right, title or claim in or to such real estate, or any part thereof. Section 7 provides for service, by the publication of a notice of the commencement of the action, directed to all whom it may concern; the notice is required to be signed by the county treasurer, and must be published once a week for four successive weeks in some newspaper of general circulation in the county in which the lands are situated; and if no such newspaper shall be published in the county, then in some newspaper of general circulation within the judicial district. It is further provided that a complete list of the lands and lots described in the petition, together with the name of the owner of each particular tract, as shown by the county assessment roll of the preceding year, as well as a statement of the total amount of the taxes and assessments, and interest thereon to October 1 of that year, shall be published in connection with the notice. And section 8 of the law provides for the proper proof of such service by publication. The act does not require personal service of summons as provided for in our code, and for this reason the plaintiff's first contention is that the law

is in conflict with section 3, article I of the constitution, because, by its enforcement, persons will be deprived of their property without due process of law. It appears that every step necessary to give the court jurisdiction, excepting personal service of summons on the owner or owners of the lands to be affected by the decree, is provided for, and it only remains for us to determine whether the omission to provide for such service of summons renders the law unconstitutional.

The act in question was copied from the laws of the state of Minnesota, where it has been in force for many years, and where it has been uniformly held that the proceeding was an action *in rem*, and that the jurisdiction of the court over the land is not affected by the failure to provide for and obtain personal service of summons upon the owner. *McQuade v. Jaffray*, 47 Minn. 326. In the opinion in that case the court said:

"Under our statute proceedings to enforce the collection of real estate taxes are purely *in rem*. They are against the land, and not against the owner. The notice is addressed, not to the persons named in the list as owners, but to all persons who have or claim any interest in any of the tracts described in the list; and they are notified that, in case of default, judgment will be entered, not against them personally, but against such pieces or parcels of land. The judgment is against the land, and the name of the owner is not required to appear at all. It is elementary that no reference to the name of the owner is necessary in proceedings *in rem*. It is, however, a common practice in such proceedings to give the name of the owner, if known, 'for frankness' sake, to increase the chances of his attention being called to the notice."

In *Pritchard v. Madren*, 24 Kan. 486, this identical question was before the court. The validity of a like law was challenged on the ground that the proceedings under it did not constitute due process of law, and the court said:

"While the ordinary process for the collection of taxes

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is by sale by the treasurer, this statute authorizes the county, in case of failure to collect by the ordinary process, to foreclose the tax lien by proceedings in the district court. Is not this due process of law? Is there any constitutional requirement or inherent necessity compelling the collection of taxes by the single process of sale by county officers? Clearly not. The method of collection is not prescribed in the constitution, but is left to the legislative discretion; and because one method has hitherto been adopted, is no limitation on the power to adopt another. There is no inherent vice in collecting taxes by judicial proceedings in the courts, instead of by summary process of sale by county officials. The legislature may adopt either, or both. A collection in either way is by due process of law. A tax, when duly levied, becomes a lien upon the land, which may be enforced in such manner as the legislature shall prescribe. The mere remedy is always within legislative control. A change in it disturbs no vested rights. Again, objection is made to the proceedings in this case and the judgment rendered, on the ground principally that neither the land nor the owner was named in the title of the petition, that in the body of the petition and the judgment the land is alleged and found to be the property of another than the real owner, and also because while the owner was a resident the only notice given was by publication. Neither of these grounds of objection is well taken. The collection of taxes is a proceeding *in rem*. The land and delinquent taxes are correctly described in the body of the petition and in the publication notice. \* \* \* If the petition fully and clearly states all the facts constituting a cause of action against this particular tract of land, facts sufficient to justify a decree of foreclosure against it, and due and legal service of all process or notice required is made, the jurisdiction of the court is complete," and it can not be said that the property is taken without due process of law.

We held in an early case that, in a proceeding *in rem*, it

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was not necessary to bring the party, whose rights were affected, before the tribunal competent to pass upon the subject matter, by service of a summons. *South Platte Land Co. v. Buffalo County*, 7 Neb. 253. We have also held that a proceeding to foreclose a tax lien, by a purchaser at an ordinary tax sale, was against the land, and the owner and others having a lien upon the land need not be made parties to the suit, where it is alleged in the petition that the owners are unknown; that the purchaser at the foreclosure sale, in such a case, takes the land by a new and independent title, and that such proceedings are not open to the objection that the property of the citizen is taken without due process of law. *Leigh v. Green*, 64 Neb. 533. See also *Butler v. Copp*, 5 Neb. (Unof.) 161. The case of *Leigh v. Green*, *supra*, was taken to the supreme court of the United States, and affirmed by that tribunal on the 22d day of February, 1904. So it may be said that it is now well settled that a proceeding to foreclose a lien for taxes, brought by state or county officials, is a proceeding *in rem* to secure a judgment against the lands assessed, and the notice by publication to all parties interested to appear, is sufficient to confer jurisdiction over resident and nonresident landowners, without personal service of summons. *Winona & St. Peter Land Co. v. Minnesota*, 159 U. S. 526, 537; *Ball v. Ridge Copper Co.*, 118 Mich. 7; *Chauncey v. Wass*, 35 Minn. 1; *Bond v. Hiestand*, 20 La. Ann. 139; *Emmons County v. Thompson*, 9 N. Dak. 598. In *Winona & St. Peter Land Co. v. Minnesota*, *supra*, Justice Brewer, speaking for the supreme court of the United States, said:

"That the notice is not personal but by publication is not sufficient to vitiate it. Where, as here, the statute prescribes the court in which and the time at which the various steps in the collection proceeding shall be taken, notice by publication to all parties interested to appear and defend is suitable and one that sufficiently answers the demand of due process of law."

We therefore hold that the act is not vulnerable to this objection.

Plaintiff contends that the lands purchased by the county at the foreclosure sale are made the property of the state; that they are obtained by escheat or forfeiture and therefore belong to the permanent school fund; that the law requiring the funds arising from the redemption or resale of the lands to be distributed to the state, county and municipality, is in conflict with the constitution, and the whole act must be declared void. Lands purchased at a foreclosure sale are not acquired by escheat or forfeiture, in the sense used in the constitution. The words "escheat" and "forfeiture" have a distinct and definite legal meaning, and can never be construed to mean sale and purchase. By the terms of the act, the county is authorized to purchase the land the second time it is offered for sale, for the sole purpose of enabling it to collect the delinquent taxes. Ample provisions are made for the resale of the lands purchased by the county at a premium, and for redemption; the amount realized by the sale or redemption is to be applied to the payment of the taxes, and prorated in the manner specified in the act. The plaintiff states no reason and cites no authority in support of his contention; apparently he does not rely upon it; and we therefore hold that it is without merit.

Plaintiff further contends that the law is unconstitutional because the act makes no provision for a trial by jury. It will be observed that, by the terms of the law itself, the action by the county to foreclose the tax lien is declared to be a suit in equity. There never was, and there is not now, any constitutional or statutory right of a jury trial in an equitable action. *Sharmer v. McIntosh*, 43 Neb. 509; *Dohle v. Omaha Foundry & Machine Co.*, 15 Neb. 436; *Mayer v. State*, 52 Neb. 764.

Again, it is difficult to see how, in an action for the foreclosure of a tax lien, any disputed question of fact triable by a jury can arise. All of the proceedings relating to the levy and assessment of the taxes are matters of public record, about which there can be no dispute, and the court is simply required to pass upon the sufficiency of

these proceedings as a matter of law. Wherever this question has been raised it has been held, that acts providing for a summary foreclosure of taxes by state or county authorities are valid, although the title and right of possession to lands is determined without affording a trial by jury. *Ball v. Ridge Copper Co.*, *supra*; *State Tax-Law cases*, 54 Mich. 350, 367.

It is next claimed that the act authorizes a release or commutation of taxes, and is in conflict with that section of the constitution which provides that "The legislature shall have no power to release or discharge any county, city, township, town, or district whatever, or the inhabitants thereof, or any corporation, or the property therein, from their or its proportionate share of taxes to be levied for state purposes, or due any municipal corporation, nor shall commutation for such taxes be authorized in any form whatever." Constitution, art. IX, sec. 4. The sale of land to satisfy a tax lien thereon is an extinguishment of the lien, which becomes merged in the title thus conveyed. Therefore it is not a release or commutation. A release is a discharge of a debt by act of the party; an extinguishment is a discharge by operation of law; a release is a voluntary relinquishment of a lien and right of action or an obligation. In a foreclosure the liens do not continue as incumbrances on the land, but by operation of law they are extinguished. In the proceeding to foreclose tax liens provided for in this act the liens are extinguished, and are not released either by the legislature or by the voluntary act of any public officer acting under authority from that body. Again, commutation is a passing from one state to another; an alteration, a change; the act of substituting one thing for another; a substitution of one sort of payment for another, or of a money payment in lieu of a performance of a compulsory duty or labor or of a single payment in lieu of a number of successive payments, usually at a reduced rate. The judicial sale of property under a decree of foreclosure, for what it will bring, although it be less than the amount of the

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taxes assessed and delinquent against it, can not be said to be a commutation of taxes within the meaning of the constitution.

The provision of our constitution prohibiting the release or commutation of taxes was taken verbatim from section 6, article IX of the constitution of Illinois, adopted in 1870. An evil had grown up in that state which had commenced to break down the principles of uniformity and equality of taxation. Therefore the adoption of such an amendment to the constitution was necessary. After this provision was adopted the legislature of that state enacted a revenue law containing, in substance, the following provision: That whenever the county judge, county clerk and county treasurer shall certify that the taxes on forfeited land equal or exceed the actual value of said land, the same shall be offered for sale to the highest bidder, after first giving ten days' notice of the time and place of sale, together with a description of the lands sold. This section is still in force there, and has not been attacked as in conflict with that constitutional limitation. Plaintiff cites the case of *State v. Graham*, 17 Neb. 43, as sustaining his point and decisive of this question. An examination of that case discloses that it is not in point, and does not control this case. In 1881 the legislature passed an act to authorize county commissioners to purchase real estate at tax sales. The act contained the following provision for the release of taxes: "Whenever the county commissioners \* \* \* have purchased any real estate \* \* \* they may sell and assign the tax certificates issued upon such purchase for an amount not less than 50 per cent. of the amount expressed in such certificates." (Sec. 2, art. III, ch. 77, Compiled Statutes.) The difference in the procedure between that act and the one here in question is vital. The present act provides for a public sale to the highest bidder. The price of the certificate is fixed at the amount of taxes due without discount or commutation. The act contemplates a sale of the lands under a decree, not merely the sale and assign-



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ment of tax certificates at private sale by the county board. Therefore, the decision in the case of *State v. Graham* has no application to the present act. Again, we find in the opinion in that case the following expression:

"If the property will not sell for sufficient to pay the delinquent taxes due thereon—an extreme case—it is possible the legislature may possess the power to authorize the sale for less than the taxes due."

If the land will not sell for the amount of taxes due, the most usual process of law would be to have the property sold under the judgment or decree of court to the highest bidder. This is in accordance with the usages of courts of equity in enforcing the collection of liens. It is the process resorted to in many states, and particularly in Illinois, where the constitutional limitation as to release and commutation of taxes is the same as ours. Again, to hold that real estate can not be sold, in a proceeding to foreclose a tax lien, for less than the amount of the taxes due and delinquent thereon would, in many instances, enable the owner to wholly escape taxation. It would only be necessary for him to neglect the payment of his taxes until they should amount to more than his property would sell for, and thereafter he could forever enjoy its use without contributing anything to the support of the commonwealth. Such a situation was never contemplated by the framers of the constitution. The plaintiff has failed to produce any authority which holds that such foreclosure proceeding constitutes a release or commutation of taxes within the meaning of the terms used in the constitution. And in the absence of precedent or authority, or of any well established principle of construction to demonstrate otherwise, it would seem that the act in this respect is not in conflict with the limitations of our constitution, and that its validity is free from doubt.

Plaintiff further contends that this law embraces many subjects not clearly expressed in its title; that it modifies and amends many sections of our statutes, and contains

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no reference to any of them either in its title or otherwise; that for these reasons it is unconstitutional. The title of the act is: "An act to enforce the payment and collection of delinquent taxes and special assessments on real property." There can be no doubt but that this title is broad and comprehensive enough to cover every provision of the law relating to that subject. It is scarcely less comprehensive than that of the general revenue law, which has been held sufficient. Again, the law is complete in itself, and while it may seem to conflict with some other provisions of our statutes, yet it is declared by its terms to be a cumulative remedy only. It is a law special in its nature and provisions, and will prevail over general provisions of the statutes.

It is also contended that the act is void because it leaves the question of its enforcement to the arbitrary determination of the board of county commissioners, thus giving that body the power to suspend the operation of the general and other revenue laws, contrary to the provisions of section 1, article III of the constitution. There is nothing in this contention. This act, taken in connection with the general revenue law, simply provides two methods of enforcing the collection of delinquent taxes and special assessments on real property. It does not delegate legislative power to the county commissioners, but gives them the option of a cumulative remedy. The legislature has declared what the law shall be when it takes effect; also upon what contingency it shall be put in operation, and when that contingency happens it takes effect by legislative will. This does not amount to a delegation of legislative power. *State v. Sullivan*, 67 Minn. 379. The law governing the sale of intoxicating liquors in this state is prohibitory unless the county board deems it expedient to grant a license. This law, together with many others of a similar character, has been upheld by the courts, and the questions affecting the validity of such laws seem to be well settled. This identical question arose in determining the constitutionality of the irrigation act. That law

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was attacked because it was claimed that it contained a delegation of legislative power to the county board. The act was upheld, and it was declared that its provisions did not amount to a delegation of legislative power. *Board of Directors of Alfalfa Irrigation District v. Collins*, 46 Neb. 411. Such a law has received the approval of the highest court in the nation. *Fallbrook Irrigation District v. Bradley*, 164 U. S. 112. The enforcement of the law in question is simply applying one of two methods of procedure to collect delinquent taxes, either of which the board is at liberty to choose. Therefore, it is not open to the constitutional objection that it is a delegation of legislative authority. *Dinsmore v. State*, 61 Neb. 418.

After a careful consideration of the whole subject, we are constrained to hold that chapter 75 of the laws of 1903 is an act complete in itself, capable of being enforced, providing for a cumulative method for the collection of delinquent taxes, which would otherwise be wholly lost to the commonwealth; that it in no manner conflicts with the provisions of our constitution so as to invalidate it, and there is no valid reason why it should not be enforced. Therefore, the several demurrers of the defendants to the plaintiff's petition are sustained, and the cause is dismissed at the plaintiff's costs.

JUDGMENT ACCORDINGLY.

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FRED W. HORST ET AL V. NORA B. LEWIS ET AL.\*

FILED MARCH 17, 1904. No. 12,826.

1. **Intoxicating Liquors: BONDS: LIABILITY.** Persons engaged in selling intoxicating liquors under license in this state are jointly and severally liable for all damages arising from such traffic, to the cause of which they have contributed, and such liability extends to the sureties upon their bonds.

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\* Rehearing denied. See opinion, p. 370, *post*.

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2. **Action: PARTIES: VENUE.** All such persons and sureties may be joined as defendants in a single action to recover damages and, if a part of them do not reside, or can not be found, in the county in which the action is brought, summons may be served upon them elsewhere.
3. **Bonds: SURETIES.** A brewing corporation may become liable as surety upon a liquor license bond, executed by it to induce the licensee to lease a building from it and deal exclusively in its products.

ERROR to the district court for Madison county: JAMES F. BOYD, JUDGE. *Affirmed.*

*Allen & Reed and Charles F. Tuttle, for plaintiffs in error.*

*S. O. Campbell, A. G. Wolfenbarger and Samuel Tuttle, contra.*

AMES, C.

This is a proceeding in error to reverse a judgment for the plaintiffs, in an action by and on behalf of a widow and her minor children to recover damages from retail liquor dealers and their sureties, for having caused the death of the husband and father by furnishing him with alcoholic drinks. There are three principal defendants each having a separate license and place of business, and each having given a separate bond with sureties, but all are alleged, and two are found by the jury, to have contributed on the same day toward causing the intoxication resulting in the death complained of. Two of these principals, Horst and Loerke, reside and have their places of business in the city of Madison in Madison county, and the other, Smith, resides and has his place of business in the village of Humphrey in Platte county. The action was brought in Madison county, where Horst and Loerke and their sureties were served, and a summons was issued to Platte county where Smith and his sureties were served. Due but unavailing objection was taken to the jurisdiction of the court over Smith and his bondsmen, on

the ground that the service was unauthorized and void, and each of the principals and his sureties separately objected for misjoinder of causes of action and of parties defendant.

We think that none of these objections is valid. The policy of the statute, as settled by decisions of this court extending over twenty years, is to render all licensed liquor dealers jointly and severally liable for the consequences of intoxication to which they have in any degree contributed. *Kerkow v. Bauer*, 15 Neb. 150; *Elshire v. Schuyler*, 15 Neb. 561; *Wardell v. McConnell*, 23 Neb. 152. Counsel make a vigorous assault upon these decisions, especially the last cited of them, which they desire to have overruled. We are indisposed to recommend so radical a revolution in the jurisprudence of the state, the more so in view of the fact that the authorities assailed appear to us to announce an obvious and necessary interpretation of the statute. Defendants in such cases are treated both by the statute and by the foregoing decisions as joint wrongdoers, but the statute also creates a right of contribution among them, an element unknown to the common law relative to joint tortfeasors. In this latter respect, the attitude of licensed liquor dealers toward each other and the public is analogous to that of mutual guarantors, each for all and all for each. Each has, therefore, within the meaning of section 41 of the code, an interest adverse to the plaintiff in any civil action for damages growing out of the traffic to which he is alleged to have contributed, and is a proper party to such an action. Section 60 provides that an action may be brought in any county in which "the defendant, or some one of the defendants, resides, or may be summoned," and section 65, that where an action is rightly brought in any county, a summons may be issued to and served in any other county, against any one or more of several defendants. It is quite clear from the foregoing that this action was rightly brought in Madison county; that Smith was a proper party thereto, and that he was lawfully served in Platte county.

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But Smith's sureties are obligated for his entire obedience to the law, and are liable, not only for his several or separate breaches of it, but for such breaches thereof, or liabilities thereunder, as he may have committed or incurred jointly with other licensees under the liquor act. They, therefore, to the same degree as their principal, had an interest in the action adverse to the plaintiffs, were proper parties to the action, and were properly served in any county in the state to which a summons was issued.

It is admitted by the pleadings that the defendant, the Krug Brewing Company, jointly with two other sureties, executed and delivered one of the bonds in suit, but it contended that the act was, as to the company, *ultra vires*, and that the instrument is therefore not obligatory upon it. The principal in this bond is the defendant Fred W. Horst. He carried on his business in a building belonging to the company and which he leased from it, and at the time he obtained his license, and of the execution and delivery of the bond, and as a part of the same transaction, he obligated himself to purchase beer for sale in his saloon exclusively from the company. It is alleged, and was proved to the satisfaction of the jury, that, in consideration of his agreement and of the renting of the building, the company executed the bond, and loaned or advanced the money used in obtaining the license. The articles of incorporation of the company contain the following grant of power: "The general nature of the business to be transacted by the corporation is to do a general business of manufacturing and sale of lager beer, ale, porter and malt, the erection of suitable buildings for the carrying on of said business, and to buy, sell, lease, rent, exchange or otherwise handle real estate in the state of Nebraska, or elsewhere, and the execution of such deeds and leases, bonds, mortgages, notes and trust deeds as may be proper in connection with such business." It thus clearly appears, as it seems to us, that the transaction above recited, in so far as it consisted of the leasing of the building and in securing a contract for the retailing of

beer, was within the express terms of the charter, and that the execution of the bond was, under the circumstances, a necessary incident thereto. We take it that there is no better settled principle of law, in this country, than that a grant of express powers includes within it implied authority to do any and all things necessary and convenient for the carrying of them into execution. In order that the company shall obtain revenues from its buildings, "in connection with its business," it must have tenants engaged in vending its products; and, in order that a tenant shall so engage, it is indispensable that he have a local license under the statute, and he can procure such a license only by giving a bond like that in suit. The procuring of the bond is the initial and an indispensable step toward procuring a tenant for the company's property and a customer for its beer, and is, we think, clearly within its charter powers.

These matters were pleaded in the reply in response to the defense of *ultra vires* tendered by the answer and the defendant complains because they were not stricken out upon motion as being a departure. We think the motion was properly overruled. The plaintiffs were not required to anticipate the defense, and the reply is solely responsive to the answer, and contains nothing inconsistent with the petition. It is incorrectly styled by counsel as the pleading of an estoppel. It goes merely to corroborate the allegation of the petition that the company became bound in the first instance by a valid contract. Perhaps the facts could have been proved without having been pleaded, but, if so, the pleading of them was mere surplusage which has wrought the company no injury.

Complaint is made that the trial judge, in stating the issue to the jury, copied largely from the petition, and in one instance, or more, referred them to that document, saying that the allegations of certain paragraphs of it were denied. That a more concise statement of the matters in dispute could have been made is probable, but it is not made to appear that the statement is incomplete or in

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any respect misleading, or that the defense was prejudiced thereby. This court has held that, under such circumstances, mere error in form will not work reversal. *Murray v. Burd*, 65 Neb. 427.

Errors are assigned for the giving and refusal of a large number of other instructions, for the most part because the rulings in that regard were in accordance with the view of the rights and obligations of the parties, which the foregoing opinion approves. The discussion would be unduly prolonged by setting them forth in full, and no useful purpose would be subserved by so doing. We have examined them carefully, and are confident that they worked the defendants, or any of them, no damage. The evidence was conflicting in some respects, but there was sufficient to maintain all the issues on behalf of the plaintiffs, except as against Smith and his sureties, in favor of whom the jury returned a verdict, and it is recommended that the judgment of the district court be affirmed.

HASTINGS and OLDFHAM, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, it is ordered that the judgment of the district court be

AFFIRMED.

The following opinion on motion for rehearing was filed May 3, 1905. *Rehearing denied*:

1. **Intoxicating Liquors: ACTION: PARTIES.** Where different retail dealers in intoxicating liquors contribute by the sale of liquor to the intoxication of an individual which causes his death, such dealers and the sureties on their bonds, which are required by the statutes, may all be joined as defendants in one action, to recover for loss of the means of support by those who have suffered injury by reason of the death of such individual.
2. **Pleadings.** Where the plea of *ultra vires* is interposed by a defendant corporation in its answer, facts not inconsistent with the allegations of the petition may be pleaded in the reply, in the nature of an estoppel or to show that the corporation was, under



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the circumstances, empowered to enter into the contract, the obligation of which is sought to be avoided.

3. **Bond: CORPORATION AS SURETY.** A brewing corporation, incorporated to do a general business of manufacture and sale of intoxicating liquors, and to erect suitable buildings for the carrying on of the business, to buy, sell, lease, rent, exchange or otherwise handle real estate, and the execution of deeds, leases, bonds, mortgages, etc., as may be proper in connection with its business, may become obligated as surety on a liquor bond of a licensed dealer, required to be given under the law regulating the sale of intoxicating liquors, where it appears that such undertaking is given with a view of renting its real estate and building in which the business is conducted, and to procure the sale of its products through such licensee.
4. **Evidence.** Evidence tending to prove that the minor sons of the deceased were required to devote all their time to the support of themselves and the family, of which they were a part, and were unable to attend the public schools, *held* properly admissible, in response to evidence on the part of the defendants tending to show that no pecuniary loss had been sustained by those claiming a right to recover for loss of support by reason of the death of the husband and father.
5. ———. Other evidence as to the payment of the debts of the deceased from the proceeds of the products raised on the farm, *held* not erroneously admitted.
6. **Expert Testimony.** Expert evidence is permitted where the facts under investigation are such that the witness is supposed, from his experience, skill and study, to have peculiar knowledge upon the subject of inquiry, which jurors generally do not possess.
7. **Carlisle Table.** The Carlisle table of mortality or life expectancy is properly admissible in evidence for the consideration of the jury in determining the probable duration of the life of the deceased, the proper foundation as to age and general health being first proved.
8. **Declarations: RES GESTÆ.** Declarations, to be admissible as a part of the *res gestæ*, must accompany and be so connected as to be a part of the fact or transaction in controversy, and must tend to illustrate or explain it, such fact or transaction itself also being admissible in evidence.
9. **Errors: REVIEW.** Where there are numerous assignments of error, the reviewing court will consider and discuss such of them only as appear to be essential to a proper disposition of the cause under review, and to finally determine the matters involved in

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the litigation. The fact that all assignments of error are not noticed and commented upon in the opinion, does not imply that they have not been considered and given due weight in arriving at a decision.

HOLCOMB, C. J.

An opinion has been filed in this case, resulting in an order affirming the judgment rendered in the trial court against the plaintiffs in error. *Horst v. Lewis*, ante, p. 365. The liability sought to be enforced against the defendants in the trial court, plaintiffs in error here, arises under the provisions of the statute regulating the sale of intoxicating liquors, popularly known as the Slocumb Liquor Law, Compiled Statutes, ch. 50 (Annotated Statutes, 7150-7184). The nature of the action and the material facts bearing on plaintiffs' right of recovery are fully stated in the former opinion. In the brief in support of the motion for a rehearing, also in the oral argument on the motion which was allowed in this case, it is earnestly insisted that not only are the questions directly passed on incorrectly decided, but that other errors relied on to work a reversal are well taken, and were entirely overlooked or ignored in the decision rendered. It is made a cause of bitter complaint that, whereas there were 166 alleged errors assigned as grounds for a reversal, but 3 of them were discussed in the opinion filed in the case. It is held in the opinion that persons engaged in selling intoxicating liquors under licenses in this state are jointly and severally liable for all damages arising from such traffic, to the cause of which they have contributed, and that such liability extends to the sureties upon the bonds the principals are required to give before engaging in the traffic; and that all such persons and their sureties may be joined as defendants in a single action to recover damages. It is also held that a brewing corporation may become liable as surety upon a liquor license bond, executed by it to induce the licensee to lease a building from it and deal exclusively in its products.

1. It is not believed that any useful purpose will be subserved, by a further discussion relating to the plaintiffs' right to join in one action the several defendants engaged in the sale of intoxicating liquors, who are alleged to have sold the deceased the liquors contributing to and producing the intoxication, which resulted in his death, and also the sureties upon the bonds of such licensed vendors of intoxicating liquors. Our statutes on the subject are peculiar and, in many respects, are dissimilar from those found in any of the other states the objects of which are the control and regulation of the liquor traffic. Our statutes have been so often construed by this court as permitting such a procedure that the question is no longer regarded by us as being an open one. It is felt that we are bound by these prior adjudications. No sufficient reasons have been advanced to justify a departure from them, and they are accordingly, as is held in the former opinion, followed.

2. The answer of the Krug Brewing Company, who is sought to be held as one of the sureties on the liquor bond of one of the principal defendants, presents the defense of *ultra vires* as to the obligation it undertook to assume, and its liability on such obligation. The reply alleges facts to the effect that the corporation was, under the circumstances, empowered to enter into the contract, and is estopped from availing itself of the plea of *ultra vires*. It is contended that the trial court erred in not striking from the reply these allegations of fact; that they in legal effect amounted to a departure from the cause of action alleged in the petition, and that such allegations, if proper and material, could only be made in stating a cause of action in the first instance. This contention is not believed to be well taken. The petition charged a liability against the brewing company, for the injury complained of, by reason of the obligation assumed when it executed the bond required by the statute as a prerequisite to the issuance of a license to the retail dealer to engage in the traffic. The defense of *ultra vires* must be affirmatively pleaded. It

would be unavailable under a general denial. *Citizens State Bank v. Pence*, 59 Neb. 579. The plea of *ultra vires* admitted the execution of the obligation and the liability arising thereunder, except for the alleged overstepping of charter powers of the corporation in entering into the contract. The defense partakes somewhat of the nature of a confession and avoidance. The execution of the contract is admitted, but the power to create a legal obligation thereunder as against the corporation is denied. The plea of *ultra vires* is not strictly defensive matter, as contended for by counsel, but is the allegation of new matter relied on as constituting a defense. The reply may, under such circumstances, consist of a denial of such new matter, and there may be alleged, in ordinary and concise language, any new matter not inconsistent with the petition. Code, sec. 109. The allegations of fact found in the reply are not inconsistent with those found in the petition. They strengthen and fortify the cause of action therein alleged. They answer the defense of new matter relied on as a complete defense to any legal liability on the part of the corporation. The averments therein found show why the plea of *ultra vires* can not be availed of, and why the contract should be enforced as executed. That this is a correct rule of pleading is recognized in *Parton Cattle Co. v. First Nat. Bank*, 21 Neb. 621, 645, where, in speaking on the same question, it is said:

"The answer alleges that at the time and date of the execution of the note the corporation was without capacity to contract, or even legal existence. By the reply the plaintiff alleges facts which under the law estops, or at least denies, to the defendant the right to avail itself of that defense. This, I think, is one of the proper offices of a reply. It by no means abandons the cause of action as originally pleaded, but fortifies it by the new facts rendered necessary by the allegations of the answer."

3. Aside from the question of the proper rule of pleading, it is earnestly contended that the defense of *ultra vires* as it affects the brewing company is fully estab-

lished, and that the conclusion heretofore announced, to the effect that the corporation may become liable when the liquor bond is executed by it, as surety, to induce the licensee to lease a building from it and to deal exclusively in its products, is not justified by the record, and is contrary to the established facts relating to the question. By virtue of the bond executed by the principal and the brewing company, as surety, the former was permitted to and did engage in the business of selling at retail intoxicating liquors for the period of one year, the time for which a license was granted. The bond was a condition precedent to the issuance of the license. Those in authority and the public relied on the validity and sufficiency of the obligation. It was the only protection to the public against the evils and injury growing out of the traffic, which the statute seeks to guard against. The obligation was knowingly and voluntarily entered into by the corporation. It can not be fairly said, under the facts as disclosed by the record, that the execution of the undertaking was purely as an accommodation to the principal. That the corporation entered into the transaction with the view of furthering its own business and from considerations leading to pecuniary advantage to it in the prosecution of its business, is too obvious to admit of serious controversy. There is no question raised as to the authority of the agents of the corporation to enter into the contract. The sole question is whether, under the facts and circumstances as disclosed by the record, the corporation had the power to legally bind itself on an obligation in writing of this character. Manifestly it should not be relieved of the obligation thus assumed, and those who have suffered injury by reason of the traffic held to be remediless unless, by the application of sound legal principles, the corporation is clearly entitled to an acquittal of all legal responsibility because the act was in excess of its charter powers. By its articles of incorporation it is incorporated "to do a general business of manufacturing and sale of lager beer, ale, porter and malt, the

erection of suitable buildings for the carrying on of said business, and to buy, sell, lease, rent, exchange or otherwise handle real estate in the state of Nebraska or elsewhere, and the execution of such deeds, leases, bonds, mortgages, notes and trust deeds as may be proper in connection with said business." This court has said when speaking of the powers of corporations to make binding contracts:

"Contracts of a corporation which are not contrary to the express provisions of its charter are presumed to be within its powers, and the burden is upon one denying their validity to prove the facts which render them *ultra vires*." *Gorder v. Plattsmouth Canning Co.*, 36 Neb. 548. In respect of the subject of *ultra vires* when interposed as a defense in an action against a corporation, this jurisdiction is, we think, committed to the doctrine that the acts of a corporation, when challenged as being in excess of its powers, may be divided into two classes. The first has reference to those transactions constituting a contract between a corporation and a stranger dealing with it, when the act in question is one which the corporation has no power to perform under any circumstances, and regarding which the corporation may at all times avail itself of the defense of *ultra vires*. To the other class belong those transactions which may be engaged in by the corporation for some purposes, but not for others regarding which the defense of *ultra vires* may or may not be available, according to the circumstances of the particular case in which the question is raised. *Sturdevant Bros. & Co. v. Farmers & Merchants Bank*, 69 Neb. 220. The supreme court of California in *Miners Ditch Co. v. Zellerbach*, 37 Cal. 543, 586, speaking of the second class observes:

"But in the latter case the defense may or may not be available, depending upon the question whether the party dealing with the corporation is aware of the intention to perform the act for an unauthorized purpose, or under circumstances not justifying its performance. And the test as between strangers having no knowledge of an un-

lawful purpose and the corporation, is to compare the terms of the contract with the provisions of the law from which the corporation derives its powers, and if the court can see that the act to be performed is necessarily beyond the powers of the corporation for any purpose, the contract can not be enforced, otherwise, it can."

In a New York case, the doctrine is thus stated:

"Where the want of power is apparent upon comparing the act done with the terms of the charter, the party dealing with the corporation is presumed to have knowledge of the defect, and the defense of *ultra vires* is available against him. But such a defense would not be permitted to prevail against a party who can not be presumed to have any knowledge of the want of authority to make the contract. Hence, if the question of power depends not merely upon the law under which the corporation acts, but upon the existence of certain extrinsic facts, resting peculiarly within the knowledge of the corporate officers, then the corporation would, I apprehend, be estopped from denying that which, by assuming to make the contract, it had virtually affirmed." *Bissell v. Michigan S. & N. I. R. Cos.*, 22 N. Y. 258-290.

It is clear that the acts under consideration are to be classed with those cases which hold that the contract may, under some circumstances, be valid and binding on the corporation, and regarding which the principle of estoppel may be relied upon to defeat the plea of *ultra vires*. Whether the assumption of the obligation of a surety on the bond of the person licensed to sell intoxicating liquors was under and in pursuance of an agreement with the principal to lease its real estate and building in Madison, where the liquors were to be sold, and deal exclusively in the products of the corporation, and whether these considerations were the sole inducement to the execution of the instrument are not, in our judgment, of controlling importance. Certain it is that the product of the brewing company must reach the hands of the consumer through the medium of the licensed retail vendor in such products.

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It is evident that, by the execution of the liquor bond, the business of the corporation was intended to be promoted, and the objects for which it was organized advanced. The same may be said of its real estate and building occupied by the licensee. The execution of the bond resulted in a demand for the use of the building, opened up an avenue for the sale of its products, and brought in additional revenues to the corporation. It was manifestly for the purpose of furthering its business, and accomplishing the objects of its incorporation, as indicated by its articles, that it obligated itself as surety on the bond of its principal, and that these results naturally flowed from the action taken is abundantly proved by the evidence in the record. As is said in the former opinion, *ante*, p. 365:

"It thus clearly appears, as it seems to us, that the transaction above recited, in so far as it consisted of the leasing of the building and in securing a contract for the retailing of beer, was within the express terms of the charter, and that the execution of the bond was, under the circumstances, a necessary incident thereto."

4. Certain evidence was permitted to be introduced over the objections of the defendants, to the effect that the boys of the deceased had, since the death of their father, been unable to go to school, and that all their time had been required on the farm in order to support the family, and this is assigned as error. As we view the record, this evidence was admitted in response to certain testimony brought out by the defendants, whereby it was sought to establish the fact that the earnings of the family had been as great since the death of the husband and father as before, or, in other words, that no pecuniary loss had been sustained by those claiming a right to recover by reason of his death. To meet this character of evidence, it was shown that the sons were compelled to perform labor on the farm, when they should have been in school, and in this we think there was no prejudicial error. If the earnings of the father were such as to support his family, and permit his children to attend the public school, and after



his death, in order to earn this same measure of support, all of the time of the boys was required for labor on the farm, this certainly would be some competent evidence to explain the reason why the earnings had not decreased, and to establish the fact that pecuniary loss had been sustained by reason of the death of the father.

5. A similar objection is interposed to certain testimony relating to the payment of debts of the deceased out of the proceeds of the products of the farm. There was, we think, no substantial error in this. The evidence tended, on the whole, to more clearly present to the jury the manner in which the deceased had provided for his family; his ability to provide for them, and the actual loss of support suffered by his death.

6. A physician was called as a witness and permitted to testify, over objections, regarding the nature of the injury which it is claimed caused the death of the deceased, and that, in his opinion, "the wounds about the head were sufficient to produce death." It is contended the court erred in not striking out this testimony; that it involved no question of science, but concerned only such facts as come within the ordinary observation of all; that it was an invasion of the province of the jury and prejudicial to the defendant. The question is not so regarded by us. It seems manifest that the nature, extent, and seriousness of the fracture of the skull, for it was this the question related to, was one peculiarly within the knowledge of a physician and surgeon, whose skill and experience would render him especially fitted to more intelligently explain the probable result of the injury than could be done by the layman, and that it was of advantage to the jury to have such testimony before it, if any question as to the cause of the deceased's death, and how it was occasioned, was to be determined by them. The cause of the death of the deceased and the forces that led to it were proper subjects of inquiry. If death was occasioned by a fracture of the skull, after the chain of circumstances which produced the fracture were proved, testimony of an expert character, it

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would seem, was properly admissible in order to prove that death resulted from the fractured skull. This is permitted, because the witness is supposed, from his experience and study, to have peculiar knowledge upon the subject of inquiry, which jurors generally have not, and is thus supposed to be more capable of drawing conclusions from facts, and to base opinions upon them, than jurors generally are presumed to be. 2 Elliott, Evidence, sec. 1031. Applying the rule adverted to to the question here being considered, we think it must follow that there was no error committed in admitting the evidence complained of.

7. There ought not to be serious controversy as to the admissibility in evidence of the Carlisle table of mortality or life expectancy. *City of Friend v. Burleigh*, 53 Neb. 674. The proper foundation was laid by evidence showing the age of the deceased and the condition of his general health. The table was an item of legitimate evidence to be considered by the jury, in determining the probable duration of the life of the deceased and the pecuniary loss sustained by his premature death. The same objection urged against this item of evidence could be, with equal propriety, urged against the introduction in evidence of any standard work of science or art, or any portion of the same. *Sioux City & P. R. Co. v. Finlayson*, 16 Neb. 578; 1 Elliott, Evidence, sec. 417.

8. The statements of the deceased while on the road from Humphrey to Madison, as to where he obtained the whiskey then in his possession, which the defendants offered to prove and which were rejected, were, in our judgment, no part of the *res gestæ*, and therefore properly excluded. They were in time long removed from the transaction resulting in his death, and but distantly, if at all, related thereto. Declarations, which accompany and are a part of the fact or transaction in controversy and tend to illustrate or explain it—such transaction itself being admissible—are admissible as being so connected as to be a part of such fact or transaction. 1 Elliott, Evidence,

sec. 537. The proposed testimony was objectionable as coming within the category of hearsay evidence. The court committed no error in excluding it. Other alleged errors are considered and discussed in the former opinion and need not here be further noticed.

9. There are many assignments which can not be noted in detail. No good purpose would be accomplished by so doing. It is related that an advocate, when arguing before an eminent jurist, was admonished to consume no more time in the discussion of the point being argued as the proposition advanced was not believed to be sound. The counsel replied that he would comply with the court's wishes, but that he had a number of other points to argue equally as good as the one he was passing. It may be that there are other assignments of error as good as those we have considered. Our mature judgment, from a full examination of the record, is that they are no better, and that to consider each of them at length and in detail would extend this opinion to an unwarranted degree.

The work of this court could, if we were required to pass upon and formally discuss in the opinion every assignment of error found in each case brought here for consideration, be thoroughly blocked, and the court would entirely fail of its mission. It would become a forum for academic discussion of abstract legal propositions, rather than a court of last resort to finally determine and decide actual controversies between litigants. "The motion," to quote from another court, "assumes that various facts appearing in the record and certain authorities in the briefs have been overlooked. The only ground, apparently, for this assumption seems to be that they have not been specifically noticed or commented upon in the opinion. It would seem to be unnecessary to state, what every member of the bar must know, that to do that would impose upon the court an amount of useless labor, quite unreasonable to expect, and would swell opinions, which should only express the reasons of the court for its conclusions as concisely as possible, into essays on each subject involved in

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the appeal. It does not follow that because a fact or an authority, deemed important by counsel, has not been noticed or commented upon in the opinion, it has not been considered and due weight given to it in arriving at the decision. In many cases, facts incorporated in the record and discussed at length by counsel, are considered by us wholly unimportant, and authorities from which long quotations are made inapplicable." *Dammert v. Osborn*, 141 N. Y. 564.

The judgment of affirmance heretofore entered is adhered to and the motion for a rehearing is denied.

REHEARING DENIED.

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SOPHIA RAPP V. SARPY COUNTY.\*

FILED MARCH 17, 1904. No. 13,428.

**Burden of Proof.** The burden of sustaining the affirmative of an issue involved in an action, does not shift during the progress of the trial, but is upon the party alleging the facts constituting the issue, and remains there until the end.

ERROR to the district court for Sarpy county: GEORGE A. DAY, JUDGE. *Reversed*.

*H. Z. Wedgwood*, for plaintiff in error.

*W. R. Patrick*, *contra*.

AMES, C.

In an action against a county for negligently permitting a highway to become and remain out of repair, causing a personal injury to the plaintiff, a traveler thereon, the answer, besides a general denial, pleaded contributory negligence. The court gave the following instruction, which was excepted to:

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\* Rehearing allowed. See opinion, p. 385, *post*.

"The defendant has also pleaded contributory negligence on the part of plaintiff as a defense to this action. The burden of proving contributory negligence, by a preponderance of the evidence, rests upon the defendant, and, unless the defendant has so proved it, this defense is of no avail; but if the plaintiff's own testimony tends to show that she was guilty of any carelessness, which caused or aided in causing the injury complained of, then the burden of proof shifts, and it devolves upon the plaintiff to satisfy you, by a preponderance of the evidence, that she was not guilty of contributory negligence."

There was a verdict for the defendant. The instruction is palpably erroneous. It is a rule, as well of law as of logic, and one which, humanly speaking, is indispensable to the right decision of any controversy whatever, that the burden of proof, or of argument, rests upon him who maintains the affirmative of an issue. Not only so, but it abides with him continuously from the opening of the debate until its close. In certain instances, deficiencies of otherwise incomplete proofs are supplied by presumptions more or less conclusive in their nature, but, in such cases, their effect is upon the weight of the evidence required to maintain the issue, not upon the obligation of the party to produce a preponderance of the former. The distinction is of the uttermost practical importance, and courts and law writers ought scrupulously to abstain from the inaccurate and misleading expression that the burden of proof "shifts" during the progress of a trial. Oftentimes, it is true, the use of the term, because of the peculiar circumstances of particular cases, may work no harm; but there is always danger of its doing so, as it may very probably have done in this case, in which the jury were told that, if there was anything in the plaintiff's testimony *tending* to prove that her conduct was negligent, she was burdened with the responsibility of establishing a negative "by a preponderance of the evidence." This could not have been so. If she had admitted that she was negligent, or if her evidence had dis-

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closed conduct on her part from which the law conclusively presumes negligence, the litigation would, of course, have been at an end, not because she would have thus assumed the burden of proof, but because she would have furnished the evidence requisite to enable the defendant to meet the requirement, in that regard, which the issue made of him. But the mere fact that her testimony tended to show that she was negligent, if it did so, went no further toward maintaining the issue tendered by the answer, than would have done evidence of equal weight and credibility produced by the defendant. All that can justly be said about it is that the fact that the testimony was her own, it being in the nature of an admission against her own interest, added immensely to its weight and credibility, but, even so, there may have been other evidence in the case tending with equal or greater strength in the opposite direction, and unless, upon the whole record, there was a preponderance showing her negligence, she was not precluded, upon that issue, from recovery. We think there is a practical unanimity among text writers and the better considered decisions to this effect. *Crowinshield v. Crowinshield*, 2 Gray (Mass.), 524; *Heinemann v. Heard*, 62 N. Y. 448; *Scott v. Wood*, 81 Cal. 398, and authorities cited in the opinion. The instruction quoted, which must have been inadvertently given, reversed this rule. If there was evidence in the case, whether in her own testimony or elsewhere, tending to prove that she was guilty of negligence, it was incumbent upon her to rebut it with other evidence of at least equal weight and credibility, of which the jury should have been permitted to judge, but more than this could not have been justly required of her.

It is recommended that the judgment of the district court be reversed and a new trial granted.

HASTINGS and OLDHAM, CC., concur.

By the Court: For the reasons stated in the foregoing

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opinion, it is ordered that the judgment of the district court be reversed and a new trial granted.

REVERSED.

The following opinion on rehearing was filed January 15, 1905. *Judgment of reversal adhered to:*

1. **Reaffirmed: BURDEN OF PROOF.** On rehearing former decision adhered to.
2. **Cases Disapproved.** The cases of *Chicago, B. & Q. R. Co. v. Featherly*, 64 Neb. 323, and *New Omaha Thompson-Houston Electric Light Co. v. Rombold*, 68 Neb. 54, 71, disapproved in so far as opposed to the doctrine in this case.

LETTON, C.

At the argument upon rehearing, our attention has been called to the decisions of this court in *Chicago, B. & Q. R. Co. v. Featherly*, 64 Neb. 323, and *New Omaha Thompson-Houston Electric Light Co. v. Rombold*, 68 Neb. 54, 71. In the *Featherly* case the jury were instructed:

"The establishment of negligence on the part of defendant, by a preponderance of the evidence, is necessary before you can find any verdict for plaintiff, in any event. If you find there was such negligence on the part of the defendant, then the burden of proof is on the defendant to show, by a preponderance of the evidence, the truth of its assertion that John Raley was negligent, and so helped to cause his own injury."

This instruction was held erroneous because the facts showed that the negligence of the deceased directly contributed to the injury, and it is said in the opinion:

"It is the settled rule in this state that, in an action for damages resulting from the alleged negligence of the defendant, when the testimony on behalf of the plaintiff is such as to justify a finding that his own negligence contributed to the injury complained of, the burden of proof is on the plaintiff to show the absence of such negligence on his part." Citing *Durrell v. Johnson*, 31 Neb. 796; *Union*

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*Stock Yards Co. v. Conoyer*, 41 Neb. 617; *Omaha Street R. Co. v. Martin*, 48 Neb. 65.

The case was reversed upon the ground that the evidence on the part of the plaintiff justified a finding that his own negligence contributed to the injury, and that therefore the burden of proof was on him to show the absence of such negligence.

In the *Durrell* case it is held:

"The rule stated in *City of Lincoln v. Walker*, 18 Neb. 244, that where the plaintiff has proved his case without disclosing any negligence on his part, the burden of proving contributory negligence is on the defendant, does not apply where the plaintiff's own testimony tends to show contributory negligence." And the following instruction was held erroneous:

"The burden of proof in this action is upon the plaintiff to establish, by competent evidence, every material allegation of his petition. And the defendant in his answer having alleged contributory negligence on the part of the plaintiff, the burden of proof is upon the defendant to establish this allegation by a preponderance of the evidence." The reason given being that the plaintiff had stated facts in his testimony from which the jury could find that his own negligence had contributed to the injury. The court further say that, if the qualification, "unless you find from the plaintiff's own testimony that he was guilty of contributory negligence," had been added to the instruction, it would have been proper. It will be seen that this case affords no support to the doctrine that the burden of proof shifts.

*Union Stock Yards Co. v. Conoyer*, 41 Neb. 617, *Omaha Street R. Co. v. Martin* 48 Neb. 65, and *Anderson v. Chicago, B. & Q. R. Co.*, 35 Neb. 95, merely hold that, where the plaintiff proves his case, without disclosing any negligence on his part, contributory negligence is a matter of defense, the burden of proving it being on the defendant. So these cases are not in point as to shifting of burden.



In *New Omaha Thompson-Houston Electric Light Co. v. Rombold*, 68 Neb. 54, the jury were instructed:

"Neither negligence nor contributory negligence can be presumed. Whoever alleges that another was guilty of negligence or contributory negligence must establish it by a preponderance of the evidence, or fail in his action or defense." The court say:

"It is claimed that this omits a feature present in this case, namely, that a party's own evidence may show contributory negligence. But by instruction No. 11 the court told the jury: 'If plaintiff's own testimony tends to show that he was guilty of carelessness which caused or aided in causing his injuries, then the burden shifts and it devolves upon the plaintiff to satisfy you by a preponderance of the evidence that he was not guilty of contributory negligence.' The court continue: 'It seems to be conceded that if these were in one instruction they would together correctly state the law. \* \* \* If their effect, when so taken together, is to correctly submit the issue of contributory negligence, the placing of them in separate paragraphs can hardly have been prejudicial.' It will be observed that the court does not pass upon the point now under consideration, but takes it as conceded that the law is correctly stated, hence, this case can hardly be said to announce the doctrine.

From a consideration of these cases, it will be seen that, while it is the settled law in this state that, where the plaintiff makes out his case without disclosing any contributory negligence on his part, the burden of proof is upon the defendant to establish that the plaintiff has been guilty of negligence, still, in only two decisions has it been said that, where the testimony on behalf of the plaintiff is such as to justify a finding that his own negligence contributed to the injury, the burden of proof shifts to the plaintiff to show the absence of such negligence on his part, and in one of these cases the opinion states the point was conceded by the parties.

There has been much confusion caused by a failure to

distinguish between the burden of proof and the weight of evidence. The burden of proof is always upon the party asserting a fact as the basis of his action or defense, and it never shifts during the progress of the trial. The weight of evidence, however, may change according to the necessities of the case in overcoming the evidence introduced by the opposite party. In an action for negligence, where the plaintiff has disclosed facts conclusively showing contributory negligence on his part, he has made no case, and the defendant is entitled to a peremptory instruction at the close of the plaintiff's case. If, however, the facts disclosed by the plaintiff, while tending to show contributory negligence, are not so clear that different minds can not well differ upon the proposition, then the defendant must produce his evidence. If he has pleaded contributory negligence as a defense, the burden is upon him to establish it. To controvert the evidence produced by the defendant, together with the facts tending to show contributory negligence which were shown by the plaintiff himself, the plaintiff must furnish sufficient evidence to overcome the weight of the defendant's evidence, as well as that which was disclosed by him tending to show such negligence on his part. In doing this, however, the burden of proof does not shift. The only duty imposed upon the plaintiff in such case is to overcome the weight of evidence, which is then against him upon this point. It is immaterial whether the evidence was furnished partly by himself or all by the defendant; it is a part of the affirmative defense pleaded by defendant, and which the plaintiff must furnish sufficient evidence to balance or overcome.

The cases of *Chicago, B. & Q. R. Co. v. Featherly*, 64 Neb. 323, and *New Omaha Thompson-Houston Electric Light Co. v. Rombold*, 68 Neb. 54, 71, are disapproved in so far as opposed to the doctrine in this case.

For these reasons, we recommend the former decision be adhered to.

AMES and OLDDHAM, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the former judgment of this court is adhered to.

JUDGMENT OF REVERSAL ADHERED TO.

HOLCOMB, C. J., dissenting.

I am persuaded that, in the majority opinion, too much stress is laid on the question of shifting the burden of proof, and too little regard had to the shifting of the court from one position to another, and thus unsettling what, as it seems to me, should be accepted as a settled rule of remedial law in this state. Certainly if a long line of judicial decisions can settle a question, the one under consideration should be regarded as having been set at rest. The doctrine of *stare decisis* appears to me to be altogether ignored or at most to be given but scant consideration. I do not especially object to the rule held to and announced in the majority opinion. I can very readily subscribe to it if the question were an open one. What I protest against is the overturning of so many cases deliberately decided, and by a unanimous court, beginning in the early history of the state's jurisprudence, in order to establish a different rule regarding the merits of which there may exist some doubt. Stability and continuity in judicial decisions require our acceptance of the results worked out in the past by the laborious and zealous efforts of those who were, equally with us, striving to reach correct conclusions and establish sound rules and principles for the guidance of all. Unless these principles and rules, so announced, are so radically wrong as to be productive of more mischief by adhering to them than would result from their overthrow, they should remain undisturbed. Quoting from another, "The conservation and orderly development of our institutions rests on our acceptance of the results of the past, and their use as lights to guide our steps in the future. The fundamental conception of a judicial body is that of one hedged about by precedents

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which are binding on the court, without regard to the personality of its members." The majority opinion and the one to which it adheres not only overrule the two cases expressly mentioned but, in effect, overthrow a long line of decisions, the first of which is reported in the 18th volume of the Nebraska reports. The instruction which is condemned was in a case where negligence is alleged as the basis of recovery and is as follows:

"The defendant has also pleaded contributory negligence on the part of the plaintiff as a defense to this action. The burden of proving contributory negligence, by a preponderance of the evidence, rests upon the defendant, and, unless the defendant has so proved it, this defense is of no avail; but if the plaintiff's own testimony tends to show that she was guilty of any carelessness, which caused or aided in causing the injury complained of, then the burden of proof shifts, and it devolves upon the plaintiff to satisfy you, by a preponderance of the evidence, that she was not guilty of contributory negligence."

It is not to be doubted that the expression, "The burden of proof shifts," is inapt and inaccurate. It does not say, however, the burden shifts during the progress of the trial. When considered in the light of the case as made and submitted, it says nothing more than, when the plaintiff's own testimony tends to show that she was guilty of contributory negligence, then she assumes the burden of proving, by a preponderance of the evidence, that the defendant was guilty of the negligence charged, and that she was not guilty of contributory negligence, and this has been the settled law in this state for years. Suppose the instruction had said, the burden of proving contributory negligence was on the defendant, unless the testimony of the plaintiff is of such a character as to justify the jury in finding that her own negligence contributed to the injury. This would be stating the same proposition in another form. It would be a change in form but not in substance. The instruction can not be regarded as misleading or prejudicial, unless the rule heretofore an-

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nounced is repudiated, as it is in the majority opinion. We do not have to go far in order to find the reason of the rule. And it is not opposed to any rule of law or logic. It is consistent with both. It is an essential element in pleading negligence, say this court, to plead an injury as the proximate consequence of a specific negligent act or omission of the defendant. *Chicago, B. & Q. R. Co. v. Kellogg*, 55 Neb. 748. If it is essential to aver that the plaintiff was without fault, where is the inconsistency in requiring him to prove the truth of the averment by a preponderance of the evidence, especially when, in making his case, he offers evidence tending to show that he was guilty of contributory negligence? In some jurisdictions it is held, and very properly, that a plaintiff in an action for negligence must, in all cases, allege and prove, not only that the defendant was guilty of the negligence charged, but also that the plaintiff acted with due care—the latter, of course, disproving contributory negligence. This is the rule of common law. This is the reason for requiring the plaintiff to allege that the injury suffered was without fault on his part. Other jurisdictions hold that contributory negligence is purely a matter of defense to be pleaded in the answer, and that the burden of establishing it always rests upon the defendant. Why we should depart from the one position, held to for so long a period, in order to occupy the other, is beyond my comprehension. To be consistent, we ought also to overthrow the long established rule as to the pleadings to which I have adverted. The discussion in the majority opinion relative to the supposed confusion arising from the terms, “the burden of proof,” and, “the weight of evidence,” does not, in my judgment, help to elucidate matters. Evidence is not weighed in parcels like groceries or drugs. There is no practical way by which to determine where the weight of evidence rests at the different stages of the trial, unless it be of so conclusive a nature as to be ruled upon as a matter of law. The jury does not weigh the evidence by

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piecemeal or in parcels. The evidence is weighed only after all has been submitted to the jury in support of, or to controvert, some issue of fact involved in the controversy. After all the evidence relating to any fact in issue has been submitted, it is for the jury to weigh it and announce its verdict. In weighing the evidence, the court declares the rule as to who assumes the burden of proof, that is, which litigant must furnish a preponderance of the evidence on any given allegation of fact in dispute. And if the required preponderance of the evidence has not been furnished, such alleged fact must be resolved against the party upon whom the burden rests. Relative to the question of on whom rests the burden of proof as to contributory negligence, this court, in a well considered and exhaustive opinion, in which the authorities are reviewed and the conflict of decisions noted, has laid down a rule whereby it has occupied what may be termed middle ground as between the rule, that the burden always rests on the plaintiff, and the contrary one, that it is purely a matter of defense. The rule as first announced is that, in an action for negligence, where the plaintiff can prove his case without disclosing any negligence on his part, contributory negligence is a matter of defense, the burden of proving it being on the defendant. *City of Lincoln v. Walker*, 18 Neb. 244. The corollary of the proposition is obvious, and it arises by the application of the rules of both law and logic. If the plaintiff in proving his case offers evidence tending to prove negligence on his part, then the burden of proving contributory negligence would not be on the defendant; and if it is not on the defendant, it having to rest somewhere, must necessarily fall on the plaintiff. This is what the court has said in the later case of *Durrell v. Johnson*, 31 Neb. 796. The judgment in that case was reversed, because the trial court did not do the very thing the trial court in the case at bar did do. In *Durrell v. Johnson*, the trial court instructed the jury that, the defendant having alleged contributory negligence, the burden of proof was upon him to establish

the allegation by a preponderance of the evidence. This court held the instruction erroneous, and said: Where the testimony of the plaintiff is of such a character as to justify the jury in finding that his own negligence contributed to the injury, it is erroneous to instruct the jury that the burden of proof of such contributory negligence is on the defendant. It is therein held that the rule stated in *City of Lincoln v. Walker, supra*, does not apply, where the plaintiff's own testimony tends to show contributory negligence on his part. This court said the instruction given would have been unobjectionable if there had been added this qualification: "Unless you find from the plaintiff's own testimony that he was guilty of contributory negligence." It is manifest that the instruction, as thus qualified and approved by this court as a correct expression of law, is substantially of the same purport as the one condemned in the case at bar. It thus appears that the court has faced about, and is now condemning what it formerly approved. In *Omaha v. Ayer*, 32 Neb. 375, the rule announced in the *Walker* case, *supra*, was reaffirmed. It is observed in the opinion that there was not such evidence of contributory negligence contained in the testimony of the plaintiff as to throw the burden of proving his contributory negligence upon the plaintiff. Of like import is *Anderson v. Chicago, B. & Q. R. Co.*, 35 Neb. 95, where it is held that, if the plaintiff proves his case without disclosing any negligence on the part of his intestate, contributory negligence is a matter of defense, and the burden of establishing it is on the defendant. The court therein say, the same point was considered by this court in the case of *City of Lincoln v. Walker*, 18 Neb. 244, where, after a consideration of the conflicting authorities, it was ruled that, when the plaintiff makes out his case without showing negligence on his part, contributory negligence is a matter of defense, and the burden of establishing it is on the defendant. In *Union Stock Yards Co. v. Conoyer*, 38 Neb. 488, the rule announced in the *Walker* case was reaffirmed, as it was also in *Omaha Street R. Co.*

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*v. Durall*, 40 Neb. 29. In *Chicago, B. & Q. R. Co. v. Putnam*, 45 Neb. 440, it is said: The plaintiff need not plead the particular precaution he took to avoid injury, and that the allegation that the injury was inflicted without fault on his part was sufficient. It is, say the court, the established law of this state that, where the plaintiff proves his case without disclosing negligence on his part, contributory negligence is a matter of defense, the burden of proving which is on the defendant. The rule is reiterated in *Omaha Street R. Co. v. Martin*, 48 Neb. 65. In *Chicago, B. & Q. R. Co. v. Featherly*, 64 Neb. 323, following this long line of decisions, in an opinion concurred in by all the commissioners participating in the opinion, and approved by a unanimous court, an instruction was held erroneous and the cause reversed because, without qualification, the jury were instructed that the burden of proof was on the defendant to show, by a preponderance of the evidence, the truth of its assertion that plaintiff's intestate was negligent, and so helped to cause his own injury. And last of all, as late as March, 1903, by a like unanimous opinion concurred in by the commissioners and approved by the court, two instructions on the subject of the burden of proof on the question of contributory negligence were considered together and held to state the law correctly, which, when so considered, were substantially the same as the one condemned in the case at bar. In one of the instructions the jury were told that, if the plaintiff's own testimony tends to show that he was guilty of carelessness which caused or aided in causing his injuries, then the burden shifts, and it devolves upon the plaintiff to satisfy you, by a preponderance of the evidence, that he was not guilty of contributory negligence. *New Omaha Thompson-Houston Electric Light Co. v. Rombold*, 68 Neb. 54. Such being the rule of law governing the question as to the burden of proof of contributory negligence, which has so often, for such length of time, been affirmed and reaffirmed after the fullest consideration and deliberation by the unanimous action of the court, I can not believe that we



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are now justified in overturning what has been so firmly and repeatedly established as the law in this jurisdiction. The doctrine of *stare decisis* applies with full force. "Those things which have been so often adjudged ought to rest in peace."

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HARLAN D. HEIST V. PETER JACOBY.

FILED MARCH 17, 1904. No. 13,199.

1. **Animals: USERS OF HIGHWAYS.** Act of February 25, laws 1875, page 190, entitled "An act to restrain sheep and swine from running at large in the state of Nebraska," *held* to have no relation to the protection of users of highways against unconfined hogs.
2. **Hogs on Highways: OWNER'S LIABILITY.** One whose sole fault is the permitting of young hogs of 60 to 100 pounds weight to go at large upon his own premises, so that they wander across the highway to a neighbor's cornfield, and in running back frighten a passer's horse, *held* not liable for injuries to the passer's equipage and person produced by such fright.

ERROR to the district court for Hamilton county:  
SAMUEL H. SORNBORGER, JUDGE. *Affirmed.*

*Hainer & Smith* and *J. H. Edmondson*, for plaintiff in error.

*John A. Whitmore, contra.*

HASTINGS, C.

Counsel for plaintiff state, on page 4 of their brief, that the question in this case is whether or not the owner of swine, intentionally permitted to run at large on the public highway, is responsible for damages done by them, through the frightening of his horse, to one who was traveling along the highway in the exercise of due care? This is a fair statement of the question. It is not claimed that there was anything vicious or unusual about the hogs or their conduct. It is not even claimed that the owner knew that they were upon the highway; but he had permitted them to run at large, and the case may be briefly stated as presenting

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the question as to whether leaving one's hogs unconfined is such an act of negligence as makes the owner liable for harm done by them in frightening a horse on the public highway.

Defendant's hogs, thus permitted to run at large, wandered across the highway running along defendant's premises and went upon the land of a neighbor. The plaintiff was driving by; the hogs ran out of the neighbor's cornfield, across the road, and apparently somewhat toward plaintiff's mare, with the peculiar noise of excited, running hogs; the mare whirled suddenly, upset the buggy, and broke plaintiff's arm; he demanded damages of the defendant, who admitted he owned the hogs and "let them run," but denied any liability for the injury. The trial court took the view that, assuming all this to be true, there was no neglect of any duty toward the traveling public on defendant's part in letting his hogs out, and that defendant was therefore not liable for the unforeseen injuries to plaintiff. Accordingly, after evidence tending to show the above state of facts had been produced, the jury were instructed to return a verdict for the defendant. A motion for new trial was overruled, and from a judgment on this verdict plaintiff brings error.

Plaintiff bases his case chiefly on the proposition that these hogs were, by statute in this state, required to be restrained from running at large; that, by consequence, they were wrongfully and in violation of law upon the public highway, and the owner therefore liable for any injury they might do in any way to a passer on the highway.

It seems to be conceded by the plaintiff that, if the hogs were rightfully upon the highway, the owner is not liable for any such unforeseen result as their frightening plaintiff's horse, there being, as above indicated, neither allegation nor proof of anything unusual or extraordinary in the hogs or their conduct, the sole negligence alleged being, allowing the hogs loose so that they could get upon the highway.

The defendant on the other hand seems to concede that, if the owner was violating the express statute of the state of Nebraska in permitting them upon the highway, or rather in leaving them out so that they could get upon the highway, he is liable for any damage directly resulting from their presence there. It is insisted, however, that there is no statute of Nebraska forbidding hogs to be upon the highway. It is claimed that the rule at common law is, merely, that one who permits his animals to go upon the highway, under such circumstances that damage to passers in the exercise of ordinary prudence might be reasonably expected to occur, is guilty of negligence and liable for its consequences. It is insisted that all of the cases cited by plaintiff, holding that a liability exists under similar circumstances to those disclosed in the present case, are where some statute expressly prohibits the animals' presence on the highway. It is also insisted that the provisions of the act of February 25, 1875, requiring sheep and swine to be "restrained from running at large in the state of Nebraska" do not in terms refer to highways; and that section two of the act, giving a lien upon trespassing hogs for damages to property, provides for its application to nothing more than trespasses upon private property. This act is the only statute which is claimed to have application to the present case. It is found at page 190, laws of 1875, and is as follows:

"An act to restrain sheep and swine from running at large in the state of Nebraska.

"Sec. 1. That from and after the first day of March, A. D. 1875, sheep and swine shall be restrained from running at large in the state of Nebraska.

"Sec. 2. That all damages to property committed by such stock so running at large, shall be paid by the owner of said stock, and the person whose property is damaged thereby, may have a lien upon said trespassing animal for the full amount of damages and costs, and enforce and collect the same by the proper civil action."

It is somewhat difficult to believe that this act was in-

tended in any way to protect passers along the highway against unconfined hogs. It is ordinarily supposed that, where any new right is conferred by statute, and a remedy at the same time provided for its vindication, the remedy so provided is exclusive; if the right previously existed, then the remedy furnished by the statute is cumulative. *Blain v. Willson*, 32 Neb. 302; *Keith & Barton v. Tilford*, 12 Neb. 271. The remedy here provided is merely a lien upon the trespassing animals for damages to property; no penalty is attached to the violation of the first section; it is not even declared unlawful to set the animals at large; no person is designated whose duty it is to restrain them; the provision is simply that the owner shall pay the damages to property, and the injured party is given a lien without being under the necessity of capturing the offending sheep or swine. It does not make the letting of the animals loose an offense against the state of Nebraska, and it does not in any way indicate that protection of the highway was in any manner within the purview of its enactment.

It is true that the title of the act indicates a purpose to restrain sheep and swine from going at large in the state of Nebraska. A law for that purpose can act only upon the owners or those in charge of the animals. It is also true that the act of 1871, known as the "Herd Law," was already in effect, providing a remedy for all trespasses by domestic animals upon cultivated lands, and giving a lien upon the stock by taking it up and substantially following the statute's provisions, but not otherwise. *Bucher v. Wagoner*, 13 Neb. 424. The purpose of this act of 1875 seems to have been to keep sheep and swine away from private premises, and remove the risk of their doing damage there, which was left by the herd law; to widen the remedy for damages done by them, and give a lien against them without capture of the animals damage feasant. The keeping of them off the highway can hardly have been in the legislator's mind. Some means for doing so would have been provided, had such been the purpose.

It is also to be said that the statutes on this subject and

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decisions of the courts construing them, recognize a clear distinction between public objects in such legislation and the protection of private rights. A good example of this is the case of *Bates v. Nelson*, 49 Mich. 459, in which a provision that animals at large on public ground might be impounded, and, after having been so at large, might be taken up if found in private grounds, was construed. It was held that cattle which had merely passed through other private premises could not be so taken, the law being intended as a vindication of public rights.

In *Shepard v. Hees*, 12 Johns. (N. Y.) \*433, a town by-law against hogs being allowed at large was held, from its connection, to apply solely to being upon the highway or coming from the highway, and to have no application to private injury by the animal's escaping from the owner's pasture into a neighbor's field.

In *McManaway v. Crispin*, 22 Ind. App. 368, and *Bee-son v. Tice*, 17 Ind. App. 78, a statute allowing animals at large on uninclosed or common land to be impounded, was held to give only a private remedy, and to have no application to those merely in the public highway.

It would seem that the trial court was right in holding that this statute does not make one who suffers his swine to go upon the highway, *ex necessitate*, negligent and responsible for all the injurious consequences which result, whether naturally to be anticipated or not.

As above stated, the main contention of the plaintiff was based upon the proposition that the act of February 25, 1875, made the letting of hogs loose upon the highway an unlawful act, and defendant's doing so, *ex necessitate*, negligence. It is also claimed, however, with less confidence, that the permitting of them at large in the manner claimed in the present case was negligence in the absence of any statute—was an encroachment upon the public right of way; for whose consequences defendant should be held liable. A large number of cases are cited by plaintiff in error where injuries of the kind complained of in the present one have been held to establish a liability. A typi-

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cal one is *Jewett v. Gage*, 55 Me. 538, 92 Am. Dec. 615. It is there held that the frightening by defendant's hog, unattended in the highway, of defendant's horse attached to a wagon, created a liability. But in Maine, as in Massachusetts, a statute forbids the presence of loose animals in a public road.

In *Parker v. Jones*, 1 Allen (Mass.), 270, it is held to be a right of the owner to depasture his land lying in the highway, but that he must do so with due regard for the safety of the traveling public, and in accordance with the laws of Massachusetts making it unlawful to permit one's animals at large in the highways. In that case, the owner of a cow had procured a keeper to attend her while grazing in the highway, and was held not to have violated the requirements of the statute. No case has been found where the mere permission by the owner, of his animals going free upon the highway passing his land, is held wrongful, in the absence of a direct prohibition by statute or ordinance. In this state it was long ago held, in *Delaney v. Errickson*, 10 Neb. 492, and same case on rehearing, 11 Neb. 533, that the English doctrine of a duty to keep one's animals on one's own close had no force in this state. The duty to confine animals was held not to have existed at the first settlement of the state, and to have been created by statutory enactment as the occasion was found to have arisen.

As it has been concluded that the only statute which is appealed to in this case has reference only to trespasses upon private rights, it would seem that the only thing which could be asked of defendant would be that he take no action, which a person exercising reasonable care and prudence would apprehend as likely to endanger the traveling public. *Haughcy v. Hart*, 62 Ia. 96. Tried by this test the action of defendant in letting his hogs run can not be said to have been negligent. If the owner had been behind these hogs, driving them from his neighbor's cornfield across the road, it would have been a permissible use of the highway. No liability would have attached to

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him in that case, if they had acted precisely in the same manner they did act, and produced the same result, unless, indeed, their original escape was, as against the general public, wrongful. If there was no violation of statutory duty in letting the hogs "run," it can not be said that it was a violation of the general duty to take reasonable precaution against endangering passers. An accident, such as happened, is not, ordinarily, to be anticipated from the mere fact of leaving young hogs at large.

Experiences like those of plaintiff in this case seem to indicate the need of legislation prohibiting the going at large on highways of domestic animals. Such legislation prevails, as we have seen, in many of the states. The time has apparently come for its enactment here, but it does not seem that it should be done by judicially extending a law passed for another and quite different purpose.

It is recommended that the judgment of the district court be affirmed.

AMES and OLDHAM, CC., not concurring.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is

AFFIRMED.

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HOLMES BLAIR V. JAMES A. AUSTIN ET AL.

FILED MARCH 17, 1904. No. 13,427.

**Real Estate Broker: ACTION.** Services as a real estate broker rendered for the owner of the land, without a written contract, can not be recovered for, as such, upon a *quantum meruit*.

ERROR to the district court for Lancaster county: EDWARD P. HOLMES, JUDGE. *Reversed.*

*Flansburg & Williams*, for plaintiff in error.

*W. M. Morning and John J. Ledwith*, contra.

## HASTINGS, C.

The main question in this case seems to be, whether the Nebraska statute, requiring all contracts for the selling of real estate between the owner and real estate brokers to be in writing, signed by both parties and fixing the amount of compensation, prevents any recovery specifically for a real estate broker's services in selling land, except such as is provided for by a contract answering these requirements?

The plaintiffs, defendants in error, brought suit in the district court to recover from Blair \$325, alleging that they were real estate brokers, buying and selling real estate, for which services they charged their employers a commission; that in June, 1902, defendant owned all but 80 acres of a certain section of land in Lancaster county; that he then employed the plaintiffs to find a purchaser for the land and agreed to pay the usual commission, namely, 5 per cent. on the first \$1,000 and 2½ per cent. on the rest of the purchase price; that plaintiffs did find a purchaser, with whom defendant entered into negotiations which resulted in a sale in February following; that just prior to the sale, the defendant, with full knowledge of their services and efforts, and that they had practically concluded the transaction, entered into independent negotiations with the purchaser, and conveyed to the latter the land for \$12,000, and refused to pay plaintiffs' commission; that the reasonable value of plaintiffs' services was "the agreed and customary commission thereon," namely, 5 per cent. on the first \$1,000 of the said purchase price and 2½ per cent. on the remainder, or \$325, on which nothing was paid.

Defendant answered, admitting the ownership of the land; admitting the sale of it for \$12,000; he says that in June, 1902, plaintiffs approached him and asked him to put a price on the premises; that he fixed the price at \$22.50 an acre, and agreed to pay a commission of \$50 on the first \$1,000 of the consideration and \$25 on each sub-



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sequent \$1,000; that said agreement was merely verbal and never reduced to writing; that plaintiffs submitted various offers from the final purchaser, but all were for a much less sum than \$22.50 an acre, and were refused; that on October 8, plaintiffs, acting on behalf of the purchaser, offered \$11,500 net for the premises, and advised the defendant that that was the best offer they could obtain from said purchaser; that they never effected a sale or made any other offer; that in February, 1903, one H. C. Young, a real estate broker, approached defendant with an offer of \$12,000 from some purchaser for the land, though defendant did not know at that time who the purchaser was; that this offer was finally accepted and the sale consummated by Young; that plaintiffs had nothing to do with it and could not have effected the sale with the same purchaser, and that defendant paid to Young a commission of \$300 for effecting the sale. The allegations of the answer were denied, and trial was had to the court without the intervention of a jury.

The court found: (1) Plaintiffs were real estate brokers, buying and selling real estate on commission; (2) That the defendant owned the land and agreed with plaintiffs in June, 1902, as stated in the answer; (3) that plaintiffs called the attention of James and Phil O'Brien to the land, and induced them to enter into negotiations for its purchase, and submit propositions to the defendant, the best one of which was for the sum of \$11,500. This was not accepted but afterwards, by plaintiffs' efforts, the O'Briens were induced to offer \$12,000; (4) That the O'Briens submitted this proposition through one McLaughlin, to whose attention plaintiffs had brought the land and its price; that defendant accepted this proposition, knowing that the purchasers were the same parties who had negotiated for the land through the plaintiffs; (5) That the O'Briens preferred to obtain the land through McLaughlin, and whether or not the sale could have been concluded without his assistance, the trial court was not able to determine; (6) That McLaughlin and Young received \$300 commission for the sale.

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The trial court found as conclusions of law: (1) That plaintiffs were the procuring cause of the sale, and entitled to recover upon a *quantum meruit* the reasonable value of their services, of which defendant had availed himself with full knowledge; (2) That the agreement alleged in the petition, not being in writing, was void, but notwithstanding its invalidity, plaintiffs were entitled to recover the reasonable value of their services, if sufficiently alleged in their petition, and, in the event they were not sufficiently alleged, they should have leave to amend in accordance with the facts. As a third conclusion, the court found that it was impossible to determine whether plaintiffs could have concluded the sale without McLaughlin's assistance, and that their services were reasonably worth the sum of \$150, and, had the sale been concluded without McLaughlin's aid, such services would have been worth \$300. In consideration of McLaughlin's assistance, only \$150 were allowed as the reasonable value of the services. Motion for new trial was overruled, and judgment entered on the findings for \$150 and costs, and defendant brings error.

His contentions are as above suggested, that the statute permits no recovery for services of this kind, except upon a written contract, and that, in any event, there is no sufficient pleading of services to entitle plaintiffs to recover anything except an agreed contract price, which is certainly forbidden. It is also urged that the evidence does not support the finding that the sale was induced by the plaintiffs' efforts.

Dealing with the last question first, it appears that, immediately after the arrangement with the defendant, the plaintiffs wrote to the O'Briens and other parties in regard to the land, and advertised it in Lancaster county newspapers; plaintiffs were well acquainted with one of the O'Briens, who then lived at Courtland, and, as a result, the latter personally examined the land; a good deal of negotiating ensued until some time in October, when the O'Brien brothers made the offer of \$11,500 for

the land; this was the last correspondence had by plaintiffs with the purchasers; at the time the \$11,500 offer was submitted and refused, plaintiffs told the defendant they would see if they could do better; from time to time after that, plaintiffs say they saw one of the O'Brien brothers, and renewed efforts to make the sale, and about the last of January, 1903, found that the O'Briens were in communication, through McLaughlin, with the defendant. Mr. Bridges testifies that the reasonable value of such services was the ordinary commission charged, which would be \$325 for a \$12,000 sale; the O'Briens deny any negotiations after October 8, 1902, with plaintiffs, but Mr. Bridges positively swears to a number of interviews after that date; the value of the services is expressly based upon the ordinary and current prices for such services, and not upon any value of plaintiffs' time; their expenses are not stated by plaintiffs. Defendant testifies that the O'Briens were brought to him by Mr. Young about January 27 or 28; that he had heard nothing from Austin & Bridges since the preceding October; that Mr. Young offered to find a purchaser for \$12,000, for a commission of \$300; defendant admits that his introduction to the O'Briens as prospective purchasers of his land was through the plaintiffs in July, 1902; defendant, on discovery that Mr. Young's proposed purchasers were the O'Briens, hesitated to close the matter, fearing his liability to plaintiffs for another commission; and he says he took counsel on the subject. Mr. Philip O'Brien testifies to talking with McLaughlin in September, and then promised the latter if the land was purchased it should be from him. McLaughlin is described by the O'Briens as an "old friend"; Mr. James O'Brien testifies to the same general purport; McLaughlin states that he got the land for sale from Young. O'Briens thought that \$22.50 was too much for the land and finally offered \$12,000; if they could not get it for that, they would not take it at all; this offer was accepted by Mr. Blair through Young, and the sale completed.

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It will be seen from this evidence that a finding either way as to the value of the services of plaintiffs to defendant might be sustained; on their testimony plaintiffs were the cause of the sale, and, according to O'Briens', Mr. Young's and Mr. McLaughlin's, their negotiations had been definitely broken off at the time the sale was effected. It remains therefore to consider the question as to whether or not the statute above mentioned permits any recovery in the absence of a written contract. In *Baker v. Gillan*, 68 Neb. 368, the statute was held to be constitutional. Does it do what is not done by the statute of frauds, prevent a recovery for the reasonable value of services actually rendered in pursuance of a void agreement? The doctrine that such services are a good ground for recovery, *quantum meruit*, is well established in Nebraska. *Riiff v. Riibe*, 68 Neb. 543. The decisions in other states are collected in 23 Century Digest, col. 2450. Does section 74, chapter 73 of the Compiled Statutes (Annotated Statutes, 10258), go further than that in respect to a contract which, by its terms, is not to be performed within one year? Both are alike void; in case of the latter, however, one who is employed under such a contract is entirely at liberty to recover for the value of services actually rendered by him. Ought the same rule to be applied in both cases? Should the courts set up an implied agreement precisely the same, in effect, as the forbidden express one? If any recovery is allowed, should it not be for losses and expenses incurred, where there are any, and not for services as such?

A somewhat careful consideration of the statute now under consideration seems to indicate a distinction. In the case of an agreement for services, void because not to be performed within a year, a recovery for services rendered is in no way interfered with by the statute. The latter does not make an agreement to do that particular work void unless in writing. Consequently, the statute of frauds is not in any way inimical to a recovery on the implied contract for the work actually done. On the con-

trary, such a right is one of the results of doing completely away with the void oral agreement. The statute now under consideration, however, provides that any agreement for the performance of services as a real estate broker shall be void unless in writing. Is it not as applicable to an implied agreement as to any other? Is it not, in effect, a forbidding of all recovery distinctly for services in selling land which are not provided for by a written agreement?

In the case of payments made on an oral agreement to convey land which the recipient refuses to perform, the recovery is, of course, and always, for the money paid, not for any loss of profits on the land bargain. In this case it does not seem possible that plaintiffs can have any recovery of commissions for making a sale. If they have incurred expenses in the transaction at defendant's request and which have redounded to his benefit, they could doubtless recover for it as money laid out and expended for his benefit and at his request. If they had shown an absolute loss of time which could and would have been valuably employed, except for its use at defendant's request upon his employment, they could probably recover for that as time devoted to defendant's profit at his request, but for services as a broker in selling land, reckoned in percentage as commission, a written contract seems to be necessary under this statute.

It is recommended that the judgment of the district court be reversed and the cause remanded, with leave to amend the pleadings.

AMES and OLDHAM, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is reversed and the cause remanded, with leave to amend the pleadings.

REVERSED.

**OTOE COUNTY V. CHARLES DORMAN ET AL.****FILED MARCH 17, 1904. No. 13,445.**

1. **Counties: ACTION: DEMURRER.** A demurrer is not the proper pleading by which to raise a question as to whether or not an action in the county's name by the county attorney was sufficiently authorized.
2. **Cause of Action.** A single transaction, causing a single item of damage, constitutes a single cause of action.
3. **County Commissioners: FRAUD: NEGLECT: ACTION.** The fact that the county commissioners have made a settlement with the treasurer, by which he is allowed to retain fees in excess of the statutory limit, does not, of itself, render the county commissioners liable for the excess of fees retained by the treasurer with their consent. A fraudulent participation on their part, with corrupt knowledge, of a wrong to the county, or else a change of situation owing to their negligence in failing to bring an action against him, which would prevent a recovery from the treasurer, would be necessary.

**ERROR to the district court for Otoe county: LEE S. ESTELLE, JUDGE. *Affirmed.***

*A. A. Bischof and W. H. Pitzer, for plaintiff in error.*

*John C. Watson and W. F. Moran, contra.*

**HASTINGS, C.**

In this case, the county of Otoe sued the members of the board of commissioners for the year 1902, to recover \$1,000 which it is alleged the commissioners, acting as a board, "wrongfully, unlawfully and negligently" allowed the county treasurer to retain. It is alleged that the law only permitted the retention by the county treasurer of \$3,400 as fees, and he was allowed to keep \$4,400. It is alleged that the county was damaged to the extent of that \$1,000. To this petition demurrers were interposed by each of the three defendants to the action: (1) That the court had no jurisdiction of the defendants' persons; (2) Had no jurisdiction of the subject of the action; (3) Plaintiff

had no legal capacity to sue; (4) A defect of parties plaintiff; (5) Several causes of action improperly joined; (6) That the petition does not state facts sufficient to constitute a cause of action. The demurrers were sustained, and judgment of dismissal entered. From this judgment the county brings error; the error complained of being the sustaining of the demurrers.

The first four grounds of the demurrers are all based on the proposition that there is no allegation in the petition of any authorization of the action by the county commissioners. We are not cited to any authority for the proposition that an action on behalf of a municipality must be expressly alleged to have been authorized by the officers who have its matters in charge. It is not claimed that the attorneys who appear for the county are not members of the bar of Otoe county, and the rule is, that the appearance of a qualified attorney on behalf of a party competent to sue carries with it the presumption that he is authorized, until the contrary appears. *Vorce v. Page*, 28 Neb. 294. It does not seem that a demurrer on the first four grounds set up in this case, raises a question as to the authority of the county attorney and his co-counsel to bring the county into this action. That the county may sue, and may be sued, the statute provides. Compiled Statutes, chapter 18, article I, section 20 (Annotated Statutes, 4438).

The fifth ground, that there is an improper joinder of causes of action, is not applicable to this petition. The only wrong alleged is the wrongful, unlawful and negligent allowing of the treasurer to retain this money, and its allowance is alleged as a single act.

It remains therefore to consider the sixth ground, whether there is a cause of action alleged, whether the allowing of the \$4,400, admitting that it was unlawful, wrongful and negligent, authorizes a recovery of the \$1,000, or of any sum, against the defendants. It is urged in support of such a recovery: (1) That the action of the county board in settling the accounts of the county treasurer was

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ministerial. This may be granted. (2) That the county board had no authority to allow more than the amount fixed by statute. This may also be granted. (3) That it is the duty of the county board to require payment into the county treasury of all fees earned in excess of his salary by the treasurer. This contention may be allowed also. The statutes certainly require the county board to adjust the treasurer's accounts, and authorize the proper action to recover any balance. Doubtless, these commissioners, if they refused to bring an action against the treasurer, or to authorize one, could be compelled to do so on a proper showing. (4) That the defendants are liable for all losses resulting from their action. As thus broadly stated it is not true. Great loss may result to the county from action of the board of county commissioners, for which they would not be liable at all. It might be granted that, if damage resulted to the county from their illegal or unauthorized action, they would be liable to it, but are they, because of a void order that he need not pay, liable for the loss of \$1,000 in the county treasurer's hands which he has never paid in? It seems clear that something more than this is required. It seems clear that their action has not in any way prejudiced the right of the county to recover this money, or done away with the treasurer's duty to pay it over. It would seem that there should have been, at least, a demand for an action to collect it from the treasurer, and a refusal to bring one, before any liability for the \$1,000 could accrue against the commissioners. Plaintiff's cause of action is simply that the commissioners, acting as a board, attempted to sanction the retention of this money by the treasurer. If such sanction is, as plaintiff claims, totally void, it has given no additional authority on the treasurer's part to hold the money; the fund is just as much the county's as it was before, and it has remained in the same hands.

It is to be said also that an action will not lie against a public officer, except for intentional wrongs or negligence



amounting to such a wrong, or a failure to perform something which is explicitly required of him by law. What is required of these commissioners is that they shall, at the proper time and in the proper way, cause an action to be brought against a defaulting treasurer. There is nothing in the statutes making them liable for failure to get the money out of him. It would seem clear that to warrant a recovery from these commissioners of this money, it must appear that they fraudulently and corruptly, by their official action, prevented the payment of it by the treasurer to the county's loss, not that they had merely wrongfully, unlawfully and negligently, but in good faith, sanctioned his retaining it. It does not seem possible to find that there is set forth in this petition a sufficient cause of action against the commissioners.

It is recommended that the judgment of the district court be affirmed.

AMES and OLDHAM, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is

AFFIRMED.

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FRANK B. SHELDON ET AL. V. GAGE COUNTY SOCIETY OF  
AGRICULTURE ET AL.

FILED MARCH 17, 1904. No. 13,471.

1. **Supplying Records.** The supplying of missing records is a matter resting in the sound discretion of a court and, unless it is abused, its exercise will not be interfered with.
2. **County Board: ALLOWANCE OF CLAIM OF AGRICULTURAL SOCIETY: REVIEW.** The application of an agricultural society for assistance from the county funds is a claim, and an appeal from its allowance by a taxpayer will lie to reexamine the facts as to the organization and competency of the society. No reexamination as to the public interest in assisting such a society is permissible.

ERROR to the district court for Gage county: CHARLES B. LETTON, JUDGE. *Reversed.*

*E. O. Kretsinger*, for plaintiffs in error.

*L. W. Colby* and *H. E. Sackett*, *contra*.

HASTINGS, C.

Two questions are presented in this case, which is an appeal from the action of the board of county commissioners of Gage county in allowing the claim of the Gage County Agricultural Society for \$994.50 for holding a fair in August, 1901. When the appeal was presented in the district court for that county, it was discovered that there was among the files no certificate, such as is required by section 12, article I, chapter 2, Compiled Statutes (Annotated Statutes, 3019) showing payment of at least \$50 dues into the treasury of such society. A motion was made for leave to supply the record; a certificate was found and filed. It was then insisted that it had not been filed before the county board, and a motion to strike it for that reason was made. At the hearing of this motion, affidavits were produced on both sides and oral testimony was taken. The court overruled the motion. This is plaintiffs' first ground of complaint. It is impossible to see that in this action there was any error; there is evidence to support the conclusion of the trial court that the certificate had been before the county board.

The other complaint is as to the dismissal of the taxpayers' appeal, on the ground that none would lie from the action of the commissioners in allowing this amount to the agricultural society.

Section 12, before referred to, provides that the county board may, at any time that it deems it for the best interest of the county, refuse to make the appropriation, or any part of it. Earlier in the section it is provided that the board "may, when they deem it for the best interest of said county, order a warrant to be drawn on the general funds of the county in favor of the president of the society." It is claimed, and the trial court seems to have

found, that this makes the whole matter discretionary with the board, and that in review of an abuse of discretion only error will lie. In brief, that this is not a "claim" against the county, from whose allowance a taxpayer may appeal under the provisions of section 38, chapter 18, article I of the Compiled Statutes (Annotated Statutes, 4456).

Doubtless, if the whole matter were entirely in the discretion of the county board, no appeal would lie from the exercise of such discretion. An appeal involves a hearing *de novo*. A matter which is entirely within the discretion of a specified tribunal can not be tried on its merits before another one. For an abuse of such a discretion, doubtless, the only remedy would be error. But an examination of said section 12 indicates that, before the board has any discretion to allow anything, the establishment of a society with a constitution and by-laws agreeable to the rules furnished by the state board of agriculture and with 20 or more resident members in the county is absolutely required, as well as the certificate before mentioned. It would seem that the word "claims" as used in the statute governing appeals from actions of county boards is used in the sense of an assertion or a pretension. The assertion by the agricultural society of a right to appeal to the discretion of the commissioners in reference to an allowance is a claim. If there is a competent agricultural society and its members have brought themselves within the law, from an exercise of the board's discretion in finding that the public interest requires the allowance, there can be no appeal. From their determination as to the existence of the antecedent facts, however, which are involved in this claim, there seems no doubt of a right to appeal, and that the court was wrong in dismissing the taxpayers' entire proceedings. There seems no reason for making a distinction between one class of claims and another, except such as the statute itself makes. One who has in a lawful and proper manner performed services for the county has an absolute right to an allowance

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of his pay, but from such an allowance any taxpayer has the right of appeal. It is a claim against the county and comes within the provisions of section 38, article I, chapter 18 of the Compiled Statutes. An agricultural society, which has complied with the law, has the right to appeal to the discretion of the county board, and to take the latter's conclusion as to the public interest. If it can induce the board to believe that public interests require county assistance to be afforded, the society can obtain it. Is this any the less a claim against the county because it is not one of absolute right, but only of discretionary consideration at the hands of the commissioners? The taxpayer, by means of the law, has committed to the county board a discretion to say whether or not it is for the best interest of the people that assistance be extended to a duly organized agricultural society, which has complied with the law. That question must be considered settled. Whether there is such a society and whether or not it has complied with the law, are questions to be determined in the first place by the board, but finally by the facts, and as to these it seems clear that section 38, article 1 of chapter 18, authorizes an appeal.

For the reexamination of these questions of fact in the district court, if the appellants desire, it is recommended that the judgment dismissing the appeal be reversed and the cause remanded for further proceedings.

AMES and OLDHAM, CC., concur.

By the Court: For the reasons stated in the foregoing opinion; the judgment dismissing the appeal is reversed and the cause remanded for further proceedings.

REVERSED.

## OTOE COUNTY V. JOHN G. STROBLE ET AL.

FILED MARCH 17, 1904. No. 13,446.

1. **County Board: ALLOWANCE OF SALARIES.** In allowing salaries fixed by statute, a board of county commissioners act ministerially.
2. ———: ———. There is no warrant of law for an allowance of extra salary to the chairman of a board of county commissioners.
3. **Illegal Allowance: LIABILITY OF MEMBERS.** Where, by the action of the board of county commissioners, a warrant is drawn upon the county treasury without any legal authority so to do, each member of the board voting for such illegal claim is jointly and severally liable to the county for the amount of money so disbursed.

ERROR to the district court for Otoe county: LEE S. ESTELLE, JUDGE. *Reversed.*

*A. A. Bischof and W. H. Pitzer, for plaintiff in error.*

*John C. Watson and W. F. Moran, contra.*

OLDHAM, C.

In many respects, this is a companion case to *Otoe County v. Dorman*, ante, p. 408. The difference in the two cases is that, in the instant case, the petition of plaintiff, in addition to charging defendants with liability for an over-allowance of assistance in the office of county treasurer, charges in the second, third and fourth counts thereof that, while the defendants were each exercising the duties of the office of county commissioner during the years 1901 and 1902, after allowing the different members of the board of county commissioners the full compensation fixed by statute for their services as members of such board, they also "wrongfully and corruptly" directed a warrant to be issued to each member thereof for the sum of \$125 each, for services as chairman of the board during the years 1900, 1901 and 1902, respectively. In the fifth count of the petition it also charges that the board illegally directed warrants to be drawn in pay-

ment of livery hire to different claimants during the years 1901 and 1902. And, as in the case above referred to, demurrers were filed by each of the defendants to this petition; the demurrers were each sustained, plaintiff's petition was dismissed, and it brings error to this court.

In view of the conclusion reached in *Otoe County v. Dorman*, *supra*, we need not consider the right of the county attorney to institute this action without direction of the board, nor need we consider the sufficiency of the allegations of the first count of plaintiff's petition, as this count stands on all fours with the petition therein considered. But we think that the allegations of the second, third and fourth paragraphs of the petition in the case at bar stand on a different principle, and charge a good cause of action against the defendants.

Having determined that the act of the board of county commissioners, in approving the settlement of the treasurer and permitting him to retain an illegal allowance for deputy hire, was merely a void act, which would not protect him or his official bondsmen from a suit by the county for the recovery of the unauthorized amount retained, we held that to warrant an action against the members of the board for this act, the petition would have to show either that it was made by a wilful and corrupt agreement between the treasurer and the members of the board, or that the board had refused to authorize an action for its recovery, or that the bondsmen were insolvent so that the ultimate loss of the amount of money improperly retained was occasioned to the county by the illegal act of the board.

While adhering to what we said in the former case, we think a different question is presented in the allegations contained in the second, third and fourth counts of the petition in the case at bar. In allowing salaries fixed by statute, the board acts ministerially and is without any discretion. The compensation of county commissioners is fixed at \$3 a day and mileage. There is no claim of any warrant in the statute for any additional

allowance for the chairman of the board. Members of the board of county commissioners are paid by warrants drawn on the treasury; consequently, when a claim is allowed and a warrant drawn, the funds of the county are depleted to the extent of the warrant. And by the allegations in the petition, which are admitted by the demurrers, the defendants, without any warrant of law, broke into the county treasury and took from it \$375 without a shadow of authority so to do. We think in this unlawful raid on the funds of the county, each member of the board who voted for the allowance of these claims was a joint tortfeasor in the unlawful act, and that each are jointly and severally liable to the county for the loss so sustained. We therefore conclude that the second, third and fourth paragraphs of plaintiff's petition allege a good cause of action, and that the district court erred in sustaining a general demurrer to the petition.

We might say in passing that, from an examination of the cause of action alleged in the fifth count of the petition, we regard it as defective in failing to allege a wilful wrong by the members of the board in allowing claims for livery hire. In the allowance of claims of this character, the board acts in a *quasi* judicial capacity, and is only liable for an intentional and wilful disregard of duty. We therefore recommend that the judgment of the district court be reversed and the cause remanded for further proceedings.

AMES and HASTINGS, CC., concur.

By the Court: For the reasons set forth in the foregoing opinion, it is ordered that the judgment of the district court be reversed and the cause remanded for further proceedings.

REVERSED.

GERTRUDE M. JACKSON ET AL., APPELLEES, v. MINNIE  
JACKSON O'RORKE ET AL., APPELLEES, IMPLEADED  
WITH JOHN HARER ET AL., APPELLANTS.

FILED MARCH 17, 1904. No. 13,472.

1. **Administrator: LEASE.** An administrator has no authority to lease the lands of his intestate after the payment of the debts and final settlement of the estate.
2. **Guardian: LEASE.** A guardian may lease the ward's lands for the term of his guardianship, but any excess in such lease beyond such term will be void at the election of the ward on attaining his majority.
3. **Tenant in Common: LEASE.** A lease by one tenant in common of an entire estate is void as to the interest of his cotenants.
4. **Dower.** An unassigned dower interest in land is not the subject of a leasehold contract conveying any interest in the lands.

APPEAL from the district court for Gage county:  
(CHARLES B. LETTON, JUDGE. *Reversed with directions.*

*E. O. Kretsinger*, for appellants.

*R. W. Sabin*, contra.

OLDHAM, C.

On the 6th day of February, 1893, George W. Jackson died intestate, seized in fee of 200 acres of land situated in Gage county, Nebraska. He left surviving him his wife, Minnie Jackson, now Minnie Jackson O'Rorke, and three minor children, Gertrude M., Edna L. and Leonard D. Jackson. His widow was appointed and duly qualified as administratrix of the estate, and also as guardian of each of the minor heirs. In 1894 the widow, as administratrix, made final settlement and distribution of the personal effects of the intestate, but was not formally discharged by the county court as administratrix. It appears that from the time of the death of the intestate, the widow, as guardian and administratrix, had leased the real estate from year to year until the year 1900, at



which time she executed a lease to John Harer and Elize Harer, defendants in the case at bar, for a period of 5 years beginning March 1, 1901, and ending March 1, 1906. The lease was signed by Mrs. O'Rorke in her individual name. At the time this lease was executed, Gertrude M. Jackson had attained her majority, being then 20 years of age; and shortly after the execution of the lease and before the institution of the instant suit, Edna L. Jackson attained her majority. Thereupon, Edna L. and Gertrude M. Jackson begun an action for partition of the real estate, making Minnie Jackson O'Rorke and Leonard D. Jackson, who is still a minor, and John Harer and Elize Harer parties defendant. The petition for partition alleged, in substance, that the plaintiffs and defendant, Leonard D. Jackson, were each entitled to a one-third interest in the real estate of the ancestor, subject to the dower interest of Minnie Jackson O'Rorke. Minnie Jackson O'Rorke answered admitting the allegations of plaintiffs' petition; Leonard D. Jackson, by his guardian *ad litem*, also filed an answer setting up the allegations of the petition and joining in the prayer for partition. The tenants, Harer and Harer, filed answer admitting the allegations of the petition as to the respective interests of the widow and heirs in the estate, but set up their rights as tenants to the occupancy of the premises during the term of the lease, and asked that when partition be made, it be made subject to their leasehold interest in the entire estate. On the issues thus joined, the court decreed a partition of the estate as prayed for by plaintiffs and the answering defendants, Minnie Jackson O'Rorke and Leonard D. Jackson, and appointed commissioners to partition the estate according to the decree, and continued the hearing on the answer and cross-petition of the lessees until a succeeding term of the court. The commissioners appointed reported that the estate was not susceptible of division in kind, and found that the interest of all the partitioners would be best subserved by a sale of the property. Issues were

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then joined on supplemental pleadings between the partitioners and the lessees on the question of the validity of the lease. On the hearing of the cause, the court made certain findings of fact which are fully supported by the record, and which we adopt as our own independent findings, for the purpose of the disposition of this case. The first of these findings is that the administratrix of the estate had made final settlement of the estate in 1894, or 6 years before the execution of the lease to defendants Harer and Harer, but that she had never been formally discharged as administratrix until after the institution of the present suit. Second, that in the execution of the lease, Minnie J. O'Rorke, the administratrix and guardian, had intended to convey both her personal and representative interest in the estate to the lessees for a period of 5 years. Third, that at the time of the execution of this lease, Gertrude M. Jackson was of full age, and never consented to the lease; that after the execution of the lease and before the institution of this suit, Edna L. Jackson arrived at her majority; that Leonard D. Jackson was, and still is, and will remain a minor during the full term of the leasehold estate; and that Minnie Jackson O'Rorke was possessed of a consummate right of dower in the lands, which had not been admeasured at the time the lease was executed.

The court found, as conclusions of law from these facts, that the lease was null and void as to the interest of the plaintiff, Gertrude M. Jackson, and that it was terminated, so far as the interest of Edna L. Jackson was concerned, at the date of the bringing of this suit, but that the lease was still in full force and of binding effect so far as it concerned the undivided interest of defendant Leonard D. Jackson and the dower interest of defendant Minnie O'Rorke. The decree closed with an equitable distribution of costs which we think should not be disturbed.

From this decree an appeal was taken by defendants Harer and Harer, and the case is now here for trial *de novo* on the issues involved in their answer and cross-petition.

The first contention of appellants is based on what we regard as a very restricted view of the holding of this court in *Lewon v. Heath*, 53 Neb. 707, to the effect that an heir may bring a suit for the possession of the land of his ancestor against any and all persons, except the administrator of the estate and such as have a right thereto from the administrator. From this excerpt from the second paragraph of the syllabus of that case, appellants contend that the heirs can not maintain this action against the lessees of the administratrix. It will be remembered that the administratrix joined with the heirs in the petition for a partition and does not assert this assumed exemption; and an examination of the full text of the decision in *Lewon v. Heath*, *supra*, shows that the court hold that lands of an intestate descend to his heirs, and that the title vests in them subject only to the debts of the ancestor; and that under section 202 of the decedent's act, chapter 23, Compiled Statutes (Annotated Statutes, 5067), the administrator of the estate has a right to possession of the real estate of which his intestate died seized, and may collect the rents thereof until the debts are paid and the estate is finally settled, but the decision goes no further than this.

Now, it appears from the facts in the case at bar that all the debts of the estate had been paid, and distribution of the personal assets had been made by the administratrix nearly 6 years before the lease in dispute had been executed. We think, then, that under the doctrine set forth in *Lewon v. Heath*, *supra*, the right of the heirs to maintain an action for the possession of the real estate accrued on the payment of the debts and the final settlement of the administratrix, and that thereafter the administratrix, as such, was invested with no authority to further lease the real estate of her intestate. While it is true that an heir can not maintain an action against the administrator while rightfully in possession of the property of his intestate, or against one holding under him while in such rightful possession, yet, when the authority of the ad-

ministrator to lease the estate has ceased by reason of his final settlement and payment of the debts, if he, or anyone under him, attempt to wrongfully hold possession, they may be proceeded against by the heirs as any other trespasser.

The next question arising is, what, if any, right Minnie Jackson O'Rorke had to lease the lands of her intestate as guardian of the minor heirs. With reference to this right, it is well established that a guardian may lease the ward's lands during the term of his guardianship, but that any excess in such a lease beyond such term will be void at the election of the ward on coming of age. 2 Kent, Commentaries, 228; *Emerson v. Spicer*, 46 N. Y. 594; *Richardson v. Richardson*, 49 Mo. 29. Now, applying this doctrine to the facts at issue, it follows that Mrs. O'Rorke was without any authority whatever to execute the lease as guardian of the interest of Gertrude M. Jackson, and that, by the institution of this suit, Edna L. Jackson elected, as she had a right to do, to determine the lease so far as her interest in the property was concerned.

Then the question remains as to the effect of the lease on the interest of Leonard D. Jackson, who was a minor and will remain so during the term of the lease. For the purpose of executing this lease, Mrs. O'Rorke in her representative capacity stood in the position of one tenant in common attempting to lease the entire estate, without the consent of the other cotenants. While such a lease as this may be upheld under certain conditions in a contest between the lessor and the lessee, yet, it is universally held that such a lease may be avoided by any of the tenants in common who did not execute it or subsequently ratify its execution. And, where a lease is executed by one tenant in common of the entire estate for a term of years, and such lease is repudiated by the cotenants, the lessee in the lease is held to be not a trespasser but a tenant by sufferance of the estate occupied under such lease. *Rising v. Stannard*, 17 Mass. 282; *Tainter v. Cole*, 120 Mass. 162; *Gear, Landlord and Tenant*, sec. 49. In other

words, the lessee of one tenant in common stands in the shoes of his lessor, and has no other or greater rights in the common property than that attaching to his lessor. It would be paradoxical to say that a tenant in common in possession of the estate might contract with himself to occupy the estate for a period of years, and defeat the right of partition of the estate by his cotenants by such an act.

We therefore conclude that, if the guardian was authorized to lease these premises so far as the interest of her ward is concerned, she could only do so in such a manner as would work no injury to the other cotenants. And as the report of the commissioners in the case at bar shows that the property is not susceptible of division in kind, and as a sale of the premises will be necessary to subserve the best interests of the partitioners, we think the land should be sold, entirely unincumbered by her lease as guardian of Leonard D. Jackson.

The only other question to be considered is, what, if any, right Mrs. O'Rorke had to convey by lease her unassigned dower interest in the premises. The rule seems to be that the right of a dower unassigned is not the subject of a lease containing covenants which run with the land. It is true that a doweress, whose right has not been admeasured, may contract with one in possession of the land to forbear an assertion of her interest in the rents and profits of the land for a period of years, and such contract will be upheld as a personal obligation between the parties; but even though it be drawn in the form of a lease, it is not a contract that runs with the land. *Croade v. Ingraham*, 13 Pick. (Mass.) 33; *Gear, Landlord and Tenant*, sec. 3.

We therefore recommend that the judgment of the district court, so far as it decrees the lease of the defendants Harer to be in full force and effect for its full term as to the undivided interest of Leonard D. Jackson, and the unassigned dower interest of the defendant Minnie Jackson O'Rorke, be reversed, and that the cause be remanded, with directions to the district court to enter a judgment

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directing a sale of the premises unincumbered by such lease, and decreeing the surrender and possession of the premises in question to the purchaser at such sale, when such sale shall have been duly confirmed by the said district court.

AMES and HASTINGS, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, it is ordered that the judgment of the district court, so far as it decrees the lease of the defendants Harer to be in full force and effect for its full term as to the undivided interest of Leonard D. Jackson, and the unassigned dower interest of the defendant Minnie Jackson O'Rorke, be reversed, and that the cause be remanded, with directions to the district court to enter a judgment directing a sale of the premises unincumbered by such lease, and decreeing the surrender and possession of the premises in question to the purchaser at such sale, when such sale shall have been duly confirmed by the said district court.

JUDGMENT ACCORDINGLY.

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GEORGE F. DICKSON ET AL. V. ROBERT STEWART.

FILED MARCH 17, 1904. No. 13,438.

1. **Trusts: STATUTE OF FRAUDS.** One who, by agreement, purchases land at a foreclosure sale for the benefit of the owner of the equity of redemption, at a price greatly below its value, can not set up the statute of frauds against the party for whom he purchased; the law will hold him to be a trustee *ex maleficio*; a court of equity will not permit the statute of frauds to be made an instrument of fraud. *Ryan v. Dox*, 34 N. Y. 307, and cases there cited.
2. **Deed as Mortgage: PAROL EVIDENCE.** Where a party acquires the legal title by purchase of land at a sheriff's sale, in pursuance of a parol agreement with a judgment debtor that he is to hold the title thus obtained as a security for the loan of the money paid to relieve the land from the judgment lien, and that he will reconvey

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when the money is refunded, the case is not distinguishable from any other, where the deed though absolute in terms was designed simply as security for a loan; and parol evidence is admissible to show the transaction to be of that character. *Reigard v. McNeil*, 38 Ill. 400.

3. **Contract: MUTUALITY.** Want of mutuality is no defense, even in an action for specific performance, where the party not bound thereby has performed all of the conditions of the contract and brought himself clearly within its terms. *Bigler v. Baker*, 40 Neb. 325.
4. **Action to Redeem: LIMITATIONS.** The right to foreclose and the right to redeem are reciprocal; and an action to redeem may be brought at any time before the statutory bar of ten years is complete. *Morrow v. Jones*, 41 Neb. 867.
5. **Interest.** The rule is well established that interest on a debt is computed up to the time of the first payment, and the payment so made is first applied to discharge the interest, and afterwards, if there be a surplus, such surplus is applied to sink the principal, and so *toties quoties* taking care that the principal thus reduced shall not at any time be suffered to accumulate by the accruing interest. *Mills v. Saunders*, 4 Neb. 190, followed and approved.

ERROR to the district court for Clay county: GEORGE W. STUBBS, JUDGE. *Reversed with directions.*

*J. L. Epperson & Sons*, for plaintiffs in error.

*George H. Hastings and L. B. Stiner*, contra.

FAWCETT, C.

On the 29th day of March, 1893, defendant in error, hereinafter styled plaintiff, was the owner and in possession of a farm of 160 acres of land in Clay county. A mortgage which he had given some years prior thereto had been foreclosed, and, on the day named, the farm was about to be sold by the sheriff under the decree of foreclosure in that case. Plaintiff alleges that, just before the opening of the sale, he called upon plaintiff in error, hereinafter styled defendant, and entered into a agreement with defendant whereby it was agreed and understood between them that defendant should bid in the land for plaintiff, pay for the same and take the title thereto in his own

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name as security for the money so paid, and convey the same to plaintiff at any time that plaintiff should demand such conveyance, upon payment to him by plaintiff of any balance that might then be due and unpaid. That defendant, in accordance with this agreement, bid in the land for \$1,960. That it was further agreed that defendant should place a mortgage on the land for \$1,600, and a second mortgage for \$120. That as additional security for his advances, defendant was to have the rents, issues and profits of the premises until he should be fully reimbursed; that when so reimbursed defendant and his wife were to make the plaintiff a good and sufficient deed to said premises, free and clear of all incumbrances excepting the two mortgages above described. That it was further agreed that the rents and profits arising from the premises should be applied: First, to the payment of taxes; second, to the payment of interest on said two mortgages; and, third, to the payment of the moneys advanced by defendant. That defendant has taken all of the rents and used the same, and refuses to render any account thereof, and refuses to convey said land to plaintiff, notwithstanding the fact that plaintiff stands ready and willing to make an accounting with defendant, and to pay any sum that may be due defendant. That plaintiff has many times during the past two years demanded a deed and accounting, which have been wholly refused. Wherefore, he prays that an accounting may be had; that defendant may be decreed to hold the title to said premises as trustee for plaintiff; that defendants be decreed to convey said premises to plaintiff in accordance with the terms of the agreement; that on failure to so convey, the decree stand as such conveyance; and for such other, further and additional relief as in equity and good conscience plaintiff ought to have. For answer defendants demur generally to the 4th paragraph of plaintiff's petition; deny all of the other allegations therein, and then allege that the defendants, nor either of them, nor any person authorized by them, or either of them, ever made or signed any mem-



orandum or note thereof, or any contract in writing for the sale of said land, or in any manner relating thereto, or for the transfer, granting, assignment or surrender of any interest therein to the plaintiff or to any other person; that neither of the defendants, nor any person authorized by them, or either of them, ever made or signed any note or memorandum in writing agreeing to make a conveyance or transfer of said land, or any interest therein to the plaintiff or any other person, and said alleged agreement was not, by its terms, to be performed within one year from the making thereof. Wherefore, they pray that plaintiff's petition be dismissed. Plaintiff's reply was a general denial.

The court below found generally for plaintiff, that the title to the land in question was taken by defendant as security for money advanced by him, with the express understanding that the same was to be reconveyed to plaintiff on the payment of the amount due, and that there is still due defendant from plaintiff \$399.17, which is a lien on the premises in controversy; and, after stating the amount by items, the court adjudged that defendant have a lien upon the premises in controversy for the said sum of \$399.17; that plaintiff pay said sum into court for the use of defendant, and that the defendants make to the plaintiff a good and sufficient deed to the premises within 30 days from the date of the decree, and, in the event of their failure so to do, that the decree should in all things operate, and be taken and construed as such deed of conveyance, and that plaintiff pay the costs of the action.

Counsel on both sides devote a great deal of space in their briefs to the discussion of express, constructive and resulting trusts—a very interesting field of discussion and one in which the writer would gladly accompany them if time would permit; but, as the only question to be determined in this case is the correctness of the holding of the district court that the deed in question was a mortgage, we feel constrained to confine this opinion to a discussion of that question alone.

There is no conflict in the evidence as to the making of the contract. Plaintiff testifies that on the day the sheriff was going to sell the property, and just prior to the opening of the sale, he called upon the defendant and said: "Now, Frank, I did a favor for you once and I want you to help me now. I want you to buy this place for me, and when I get the money I will redeem it. So Dickson bought the property. \* \* \* Dickson was to buy the place for me, and when I got the money I was to give it to him; then he was to deed it back to me." The defendant himself testifies: "Well, at the time that this land was for sale, Mr. Stewart came to my office, and he told me that he wanted to buy this land at the sheriff's sale, but that he didn't have any money, or not enough money, to buy it; and that the sheriff said he would not take him, and that he advised him to come and get me to buy the land for him, and then Stewart said to me that he wanted me to go up and buy the land for him, as Davis, the sheriff, would take me, and that he, Stewart, wanted some one to buy the land that he could depend on." The court asked defendant the following questions:

Q. Now, was it your understanding, at the time that you bought this farm, that you were to buy it and hold it until Mr. Stewart could redeem it and pay you back the amount that you had paid out? Was that your understanding and intention?

A. Yes, sir, I was to buy it, to buy land for him.

Q. And hold it until he paid you back?

A. Yes, sir.

By General Hastings:

Q. You were to hold the land until it was redeemed, for your security?

A. Well, I think so, but I didn't think that it would run ten years.

In the light of this testimony we do not see how the trial court could have done otherwise than to find that the deed from the sheriff to the defendant, although absolute in its terms, was in fact a mortgage from the plaintiff

to the defendant as security for the money advanced by defendant.

Defendant contends that the rule so frequently announced by this and other courts that a deed, though absolute upon its face, if intended as security, will be held to be a mortgage, does not apply in a case where the maker of the deed is a third party. In other words, that to have entitled plaintiff to rely upon this rule, he must himself have been the grantor in the deed, when, as a matter of fact, the grantor was the sheriff. We do not think the contention is sound. While the sheriff is the nominal grantor in the deed, yet, the interest which he conveyed thereby was the interest of the plaintiff. The plaintiff at that time was the owner of the fee and in possession of the premises, and the deed by the sheriff conveyed that ownership and right of possession to the defendant, so that, in effect, it was a deed from the plaintiff to defendant. It is further contended by defendant, that the contract was void because the relation of creditor and debtor was not created by the contract; that, if plaintiff failed to repay the money to defendant, defendant would have had no action against him for the recovery of the money. In other words, that the contract was void for want of mutuality. We are unable to agree with this contention, for two reasons: First, the relation of debtor and creditor was created. Under the same evidence which we have quoted from the record, defendant could at any time, after a reasonable time had elapsed, have demanded payment from the plaintiff, and, in the event of plaintiff's failure to pay, could have proceeded to foreclose his deed as a mortgage, with all the rights of any ordinary mortgagee. Second, this court has held in *Bigler v. Baker*, 40 Neb. 325, that "want of mutuality is no defense, even in an action for specific performance, where the party not bound thereby has performed all of the conditions of the contract, and brought himself clearly within its terms." In this case plaintiff had complied with his part of the contract. After entering into this agreement with defendant, he made no effort

to obtain the money elsewhere to redeem the property from defendant's bid, but allowed the sale to defendant for \$1,960, of property which the undisputed evidence shows to have been worth from \$3,200 to \$3,500, to be confirmed, and a deed to be issued to defendant thereunder, and immediately delivered possession of the premises to defendant, relying upon the fact, as stated by defendant in his testimony, that defendant was a man "that he could depend on." Plaintiff had "performed all of the conditions imposed upon him, and brought himself clearly within the terms of the agreement." Hence, under the decision of this court in *Bigler v. Baker, supra*, if a want of mutuality had existed in this case, it would not be a valid objection to plaintiff's right to recover. While we concede that there is some conflict in the authorities upon this point, that conflict was considered by this court in *Bigler v. Baker*, and the rule above announced adopted as the true rule.

The next contention of defendant is that section 3, chapter 32 of the Compiled Statutes (Annotated Statutes, 5952), is a complete barrier to plaintiff's right to recover. Defendant must also fail in this contention. If defendant did in fact bid in the land for plaintiff under the agreement set out, he held it in trust for him, and had no other interest in it than that of a mortgagee to secure the repayment of the purchase money and other advances made by him. But if he had no intention of keeping his part of the agreement, and did not in fact intend to hold the property in trust for plaintiff, he was guilty of a fraud which the court will relieve against. The court has power to relieve against such fraud, and the means to be employed is to convert the person who has gained an advantage by means of his fraudulent act into a trustee for those who have been injured thereby. *Ryan v. Dox*, 34 N. Y. 307. Defendant relies upon section 3, chapter 32, Compiled Statutes, but he overlooks section 6 of the same chapter (Annotated Statutes, 5955), which reads as follows: "Nothing in this chapter contained shall be con-

strued to abridge the powers of the court of chancery to compel the specific performance of agreements in cases of part performance." And he also overlooks another very important proposition: That a court of equity will never permit a party to shield himself behind a statute of frauds in order to perpetrate a fraud. In the case of *Sanford v. Norris*, 4 Abb. Ct. App. (N. Y.) 144, the court say:

"The circumstances attending his purchase are not obscured in the least by any doubts, either as regards the facts or their moral bearing; nor is any excuse or apology offered for his violated faith; and the simple question presented to this court is, whether the fruits of his perfidy are secured to him by a law having for its object the prevention of frauds. It stands indisputably proved that the defendant obtained this title on the pretense that he was purchasing for Mrs. Sandford, as a friendly act to her, and under agreement with her that he would take and hold the title for her benefit. Having thus obtained the title himself, he claims and insists that he is under no legal obligation to carry out the arrangement, because it is not evidenced by a writing, and that he may violate the trust and confidence reposed in him with impunity. But the law will not give its aid in support of a wrong and fraud so flagrant. If the question could ever have been considered open for discussion, it must now be deemed settled by the recent decision of this court in *Ryan v. Dox*, 34 N. Y. 307, wherein the equitable principle is recognized as the established law of this state, that 'equity will at all times lend its aid to defeat a fraud, notwithstanding the statute of frauds.'"

The case of *Ryan v. Dox*, *supra*, considers this proposition at great length and quotes from a large number of cases, both in this country and England, all to the effect that a court of equity will never permit the statute of frauds to be used as a shield for the perpetration of a fraud.

Another contention of defendant is that, if plaintiff had a right of redemption, it should have been exercised within

a reasonable time; that so long a time has elapsed since the making of the agreement that plaintiff ought not now to be permitted to exercise the right of redemption. That matter has also been settled adversely to defendant, by this court, in *Morrow v. Jones*, 41 Neb. 867, in which it is held that the right to foreclose and the right to redeem are reciprocal, and that an action to redeem may be brought at any time before the statutory bar of ten years is complete. Citing *Seawright v. Parmer*, 7 So. (Ala.) 201; *Green v. Capps*, 142 Ill. 286; *Rogers v. Benton*, 39 Minn. 39, and cases there cited. It follows therefore that plaintiff was not precluded from maintaining this action by lapse of time.

Defendant relies with great confidence on *Walter v. Klock*, 55 Ill. 362, but, even if the supreme court of Illinois had not subsequently passed upon the same matters involved in that case, it would easily be distinguishable from the case at bar. As a matter of fact the supreme court of Illinois, in *Reigard v. McNeil*, 38 Ill. 400, has held:

"It has been held repeatedly that deeds, in form absolute, may be shown to be mortgages in fact. Courts are not estopped from looking into the facts and circumstances of such a deed, to ascertain whether it was not intended as a mere security for the loan of money. And parol evidence is admissible to show the transaction to be of that character. And where a party acquires the legal title by purchase at a sheriff's sale of land under execution, in pursuance of a parol agreement with a judgment debtor that he is to hold the title thus obtained as a security for a loan of the money paid to relieve the land from the judgment lien, and that he will reconvey when the money is refunded, the case is not distinguishable from any other where the deed, though absolute in terms, was designed simply as security for a loan."

And in *Walter v. Klock*, *supra*, that court say that the case they were then considering had no application to the facts in the case of *Reigard v. McNeil*. And, later, in *Klock v. Walter*, 70 Ill. 416, the court say:

"At the September term, 1870, this case was before this court, and is reported in 55 Ill. 362. \* \* \* The evidence establishes beyond doubt that the whole transaction was for the benefit of complainant, and that she was to refund the money, with interest. It operated as a loan to her, and, under the terms of the arrangement, the purchase at the sale, by McCullom, operated as a mortgage. He was simply to hold the land until complainant could sell it, and pay the money, with interest. By the arrangement he took the legal title, but in equity a trust resulted to her." Citing *Reigard v. McNeil*, *supra*, and *Smith v. Doyle*, 46 Ill. 451, each being a case where a sheriff's deed was held on parol proof to be a mortgage. It will thus appear that the supreme court of Illinois, instead of favoring defendant's contention, is clearly in line with our holding in this case.

Defendant assigns five errors in the court's computation, all of which we have carefully considered. The court charged defendant with \$30 for rent of pasture for the year 1894. This was error, as no rent was paid for the pasture that year. Defendant is charged with \$146.71 and interest, for sand in 1897. This is not quite correct. The total amount is \$146.30, and interest should only be charged on \$140.20 from December 12, 1902. The court charged defendant with 400 bushels of corn in 1893, \$80. The amount was only 300 bushels, \$60, an error of \$20. The court charged defendant with corn rental in 1896, \$30. The evidence shows, and the parties agree, that there was a total failure of the crop for 1896 so that no rent was received for that year. We observe also that the court charged defendant with only \$90 for 600 bushels of corn in 1895, instead of \$120, an error of \$30 the other way. The decree should be amended so as to correct these errors. Defendant also claims that the court erred in charging defendant with 500 bushels of corn for 1902, claiming that 500 bushels was the total crop and not the rent portion thereof; but by reference to question 12, record p. 97, it will be found that the 500 bushels of corn referred to was

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the rent portion of the crop; hence the finding of the court on that point is correct.

The court followed an erroneous rule in computing interest on the debits and credits. The rule is well established that "Interest on a judgment or debt due is computed up to the time of the first payment, and the payment so made is first applied to discharge the interest, and afterwards, if there be a surplus, such surplus is applied to sink the principal, and so *toties quoties*—taking care that the principal thus reduced shall not at any time be suffered to accumulate by the accruing interest." *Mills v. Saunders*, 4 Neb. 190, and *Davis v. Neligh*, 7 Neb. 78. This method the court did not adopt.

The decree fails to do complete justice to the defendant in another particular, namely: Before plaintiff would be entitled to a deed from defendant for the lands in controversy, he should not only pay the amount found due under the accounting of the court, as corrected by this opinion, but he should also relieve defendant from his liability on the \$1,600 note and mortgage.

The case should be reversed and remanded to the district court, with directions to make another computation in harmony herewith, and to modify the decree so as to require plaintiff to pay the corrected amount and relieve defendant of his liability on the \$1,600 note and mortgage, within a reasonable time to be fixed by the court; and that, upon such being done, defendant be required to reconvey; and we so recommend.

ALBERT and GLANVILLE, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the decree of the district court is reversed and the cause remanded, with directions to that court to correct its computation and modify its decree to conform to the views expressed in said opinion.

JUDGMENT ACCORDINGLY.



## WILMER W. WILSON V. OTOE COUNTY.

FILED MARCH 17, 1904. No. 13,333.

1. **County Officers: CONTRACTS.** Section 51, article I, chapter 18, Compiled Statutes, which prohibits county officers from being peculiarly interested in or receiving the benefit of any contract executed by the county for the furnishing of supplies or any other purpose, is general in its nature, and applies to all county officers and to every class of contracts.
2. ———: **ACTION.** A contract between a county and one of its officers, whereby such officer undertakes to perform extra-official services, for which the county undertakes to pay him compensation in addition to the fees or salary allowed by law, is in violation of said section and will not support an action for such extra compensation. *Shepard v. Easterling*, 61 Neb. 882, *contra*, overruled.

ERROR to the district court for Otoe county: PAUL JESSEN, JUDGE. *Affirmed*.

W. W. Wilson and L. F. Jackson, for plaintiff in error.

A. A. Bischof, *contra*.

ALBERT, C.

The parties to the record in this court stand in the same order they stood below. The plaintiff was county attorney of the defendant county. While holding that office, and at the instance and request of the defendant, he followed certain litigation from the district court for his county to this court, where he appeared and represented the county; he also prepared and filed a petition for the defendant in an action which it brought in another county, but did not conduct the litigation which followed. This action was brought to recover the reasonable value of the services of the plaintiff in the matters just mentioned. The district court sustained a demurrer to the petition and gave judgment for the defendant, and the only question presented to this court is that raised by the demurrer.

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The only statutory provision touching the compensation of a county attorney is section 19, chapter 7, Compiled Statutes (Annotated Statutes, 9143). It fixes the annual salary of such officer, and provides for the payment of his traveling and hotel expenses, where engaged in actions in which the state or county is a party interested, "*which have been transferred by change of venue from his county to any other county in the state.*" That the compensation thus fixed is in full of all services rendered by county attorneys in the discharge of their official duties, is conceded. It follows, then, and the petition is framed on the theory that, if the plaintiff is entitled to recover, it is by virtue of a contract between himself and the defendant county, whereby he was employed to render services which in their nature were extra-official.

This brings us at once to what we regard as the vital question in this case, namely, can a county officer make a valid contract with the county for compensation for extra-official services? In *Shepard v. Easterling*, 61 Neb. 882, this court answered this question in the affirmative. But it is clear that the question was not necessarily involved in that case. It is not discussed, and is adverted to only in that portion of the opinion devoted to the discussion of a proposition which the opinion itself shows was not urged. Throughout the entire opinion there is no mention or reference to the statute, which in express terms forbids contracts between a county and any of its officers. For these reasons, and because of the importance of the question involved, we do not feel bound, so far as that question is concerned, by the view expressed in that case, and shall consider the question accordingly.

Section 51, article I, chapter 18, Compiled Statutes (Annotated Statutes, 4469), provides: "No county officer shall in any manner, directly or indirectly, be pecuniarily interested in or receive the benefit of any contracts executed by the county for the furnishing of supplies, or any other purpose." A violation of that provision is denounced as a felony in the section immediately following it. The temp-

tation of public officers to vicarious generosity is well known. It assails them with greater force when the object of such generosity is one of their own number, and in a position to reciprocate, or to further or thwart the purposes of his fellows. The object of the provision just quoted is to remove that temptation so far as possible, and to render innocuous that spirit of amity and reciprocity which is apt to prevail among public officers. In view of the mischief aimed at by such provision, and its comprehensive language, there can be no doubt that it was intended to include every species of contract in which an officer of the county may have a pecuniary interest, whether it be for furnishing supplies or services. It is true such provision was enacted long before the office of county attorney was created, but that may be said of the statute relating to embezzlement by a public officer, and other statutes, which unquestionably apply to a county attorney. The provision is general, and there is nothing in its object, or in the nature of the office of county attorney, from which it may be fairly inferred that such officer is exempt from its operation. He is the legal adviser of the officers who are authorized to act on behalf of the county in making contracts, and who must eventually pass on claims based on such contracts; his influence with such officers is generally commensurate with his fitness for his office, and it is not difficult to see that there would be a strong temptation to turn that influence to his own advantage, were he permitted to contract with the county.

In this view of the case we are not called upon to determine whether it was the official duty of the county attorney to represent the county in the matters for which he seeks to recover. If it were such duty, then his compensation therefor is covered by the salary fixed by law; if, as is claimed, such services were rendered in pursuance of a contract with the county, then, as we have seen, the contract is in violation of a positive statute, and there can be no recovery thereon.

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Tyson v. Tyson.

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It is recommended that the judgment of the district court be affirmed.

GLANVILLE, C., concurs.

FAWCETT, C., not sitting.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is

**AFFIRMED.**

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MARY ELLA TYSON V. AMASA F. TYSON ET AL.

FILED MARCH 17, 1904. No. 13,343.

1. **Dower and Homestead: COUNTY COURT: JURISDICTION.** When a widow is entitled to dower and homestead in lands of which her husband died seized, and the facts upon which her right of homestead and dower depend are not in dispute, the county court of the county in which the estate of the husband is settled has jurisdiction to assign such dower and homestead.
2. ———. In order to oust the county court of such jurisdiction, the right of the widow must be disputed by presenting an issue of fact, which if established by proof would defeat her claim of dower or homestead, and such issue must be one which the county court by its organization is unable to try. Following *Guthman v. Guthman*, 18 Neb. 98; *Serry v. Curry*, 26 Neb. 353.
3. **Extent of Homestead.** In a contest between the widow and the heirs at law as to the extent of her homestead in suburban lands, she is entitled to a homestead not exceeding 160 acres in area and \$2,000 in value.

ERROR to the district court for Washington county:  
CHARLES T. DICKINSON, JUDGE. *Affirmed.*

*Brome & Burnett*, for plaintiff in error.

*Frank Dolezal* and *E. C. Jackson*, *contra.*

ALBERT, C.

Peter Tyson died intestate in Washington county; the plaintiff in error is his widow; the defendant in error, Amasa F. Tyson, is his only child, and had attained his

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majority at the time of his father's death. The other defendant in error is administrator of the estate. On the 15th day of January, 1903, the defendant in error, Tyson, filed a petition in the county court which, so far as is material at present, is as follows:

"The said decedent (referring to the intestate) died seized of the following described lands situated in said Washington county, to wit: The north half of the southwest quarter, N. W.  $\frac{1}{4}$  of S. E.  $\frac{1}{4}$ , and lot 1 of section 9 in township 17 north, range 10 east, and containing about 156 and  $\frac{3}{4}$  acres of land, and all of which is a farm highly improved and the reasonable value of the use of the cultivated lands of said farm a year, being the rent thereof, is reasonably worth the sum of \$350 a year and was worth said rental during the year 1902. That said Mary Ella Tyson claims a homestead interest in said premises, and occupies the dwelling house and buildings under her claim that the same was the homestead of said decedent and of herself during the lifetime of said decedent and at the time of his death, and your petitioner alleges that the said homestead consisting of the said dwelling house and outhouses and the land upon which the same are situated to the extent in value of \$2,000 is a homestead, and that the said Mary Ella Tyson is entitled to use and occupy said dwelling house and outhouses with so much land upon which the same is situated as taken together with said buildings, shall equal in value the sum of \$2,000, and no more, as a homestead. That in addition to said homestead, the said Mary Ella Tyson is entitled to dower interest in said land to the extent of one-third thereof, and is entitled to have the same set aside, and that your petitioner is entitled to the remainder of said premises, and that the said Mary Ella Tyson under the said claim of homestead and dower wrongfully excludes your petitioner therefrom, and wrongfully claims the whole of said real estate as homestead and dower, and refuses to account for the rent of that portion thereof not included in the homestead interest to which she is entitled; that said real estate is of the value

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of \$11,750, and exceeds the homestead in value by \$9,750, and the said Mary Ella Tyson also claims the right to receive from said estate the said sum of \$35 a month as support, as specified in said order of this court, and is drawing the same."

The prayer is for the appointment of three persons to set off the homestead and dower of the plaintiff by metes and bounds, the former not to exceed \$2,000 in value.

The answer, among other allegations, contains the following:

"That said Mary Ella Tyson is receiving \$35 a month for her support, and is occupying and using the land described in said petition and claims the exclusive right so to do. Further answering, said Mary Ella Tyson alleges that the land described in said petition consists of 156 $\frac{3}{4}$  acres of land, being the land upon which the dwelling house of said deceased is situated, and not in any incorporated city or village; that said land and all of it was the homestead of said Peter Tyson and Mary Ella Tyson, his wife, upon which they resided at the time of the death of said Peter Tyson, and that said homestead and all of it at the death of said Peter Tyson vested in his surviving wife, Mary Ella Tyson, during her life, and said petitioner, Amasa F. Tyson, has no right to or interest in said land during the life of said Mary Ella Tyson. Said Mary Ella Tyson further shows to the court that said petitioner has no present interest in said land; that the county court of said Washington county has no right or power to try or in any manner adjudicate the claim and title of said Mary Ella Tyson to said land and all thereof, or by its judgments or decrees in any manner inquire respecting same, determine or interfere with her right to the use and possession thereof, or to set off a homestead or assign dower therefrom, and the said Mary Ella Tyson hereby objects to the exercise of any power or jurisdiction of said county court in that behalf."

A hearing was had, and the county court found that the plaintiff in error had a homestead in the premises, or in so

much thereof as should not exceed in value \$2,000, and was entitled to dower therein, and appointed three persons to assign her dower and homestead by metes and bounds. From that decree the plaintiff in error prosecuted error to the district court, where the decree of the county court was affirmed. The case is brought here by petition in error.

The plaintiff contends that the county court was without jurisdiction over the subject matter. This contention is based on section 16, article VI of the constitution, which gives county courts original jurisdiction in all matters of probate, settlements of the estates of deceased persons, the appointment of guardians and the settlement of their accounts, and such other jurisdiction as may be given by general law, but which also provides that they shall not have jurisdiction "in actions in which title to real estate is sought to be recovered, or may be drawn in question."

*Guthman v. Guthman*, 18 Neb. 98, involved a construction of the constitutional provision just quoted. In that case, the widow made application in the county court for an assignment of dower, and inferentially homestead, in certain lands of which her husband died seized. Her right of dower and homestead in the lands was admitted, but the jurisdiction of the county court to grant the relief sought was challenged on the same ground that the jurisdiction of such court is questioned in this case. The holding of the court in that case is reflected by the headnotes, which are as follows:

"1. When a widow is entitled to dower in the lands of which her husband died seized, and her right to dower is not disputed by the heirs or devisees, or any person claiming under them or either of them, it may be assigned to her in whatever county the lands may lie, by the county court of the county in which the estate of the husband is settled, upon the application of the widow.

"2. In order to oust the county court of such jurisdiction, the right of the applicant to such dower must be disputed by presenting an issue of fact which, if established by proof, would defeat her claim of dower, and such

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issue must be one which the county court by its organization is unable to try.

"3. A county court has jurisdiction to set aside a homestead to a widow by virtue of its general jurisdiction in matters of probate and the settlement of estates."

In *Serry v. Curry*, 26 Neb. 353, this court, after quoting the second headnote in *Guthman v. Guthman*, *supra*, say: "This, we think, is a correct statement of the law, and will be adhered to." The jurisdiction of the county court in such matters is also recognized in *Brandhoefer v. Bain*, 45 Neb. 781, and *Clemons v. Heclan*, 52 Neb. 287. The plaintiff has not overlooked the rule announced in *Guthman v. Guthman*, *supra*, but attempts to distinguish between that case and the one at bar. The distinction as stated in the language of her brief is as follows:

"In the *Guthman* case, the widow filed her petition claiming dower. The heir at law by his answer admitted that she was entitled 'to have and receive her dower right in the estate.' Under these circumstances, the court might very well say, as it did, 'that the petitioner's right of dower was not disputed in the manner contemplated by the statute so as to oust the county court of jurisdiction.' In the case at bar, the petition of Amasa F. Tyson in the county court recited the fact that plaintiff in error claimed all of the premises as a homestead, and alleged that she wrongfully excluded the petitioner from the entire premises on account of such claim. It appeared upon the face of the petition that the precise and only question the petitioner sought to have determined was the validity of the claim of plaintiff in error to a life estate in the whole 156 $\frac{3}{4}$  acres."

The language thus quoted obviously shows some points of difference between the two cases, but they are not, we think, such as would remove the case at bar from the operation of the rule announced in the other. It is conceded by counsel that the pleadings in this case presented no question of fact, but merely a question of law. That was precisely the condition of the pleading in *Guthman v.*



*Guthman, supra*, and this court held, as we have seen, that, in order to oust the jurisdiction of the county court, the right of the applicant must be disputed by presenting an *issue of fact* which, if established by proof, would defeat her claim, and such issue must be one which the county court by its organization is unable to try. As no such issue was presented in this case, on the authority of the cases just cited, it seems too clear to admit of argument that the county court had jurisdiction in the premises.

Another contention of the plaintiff is that she is entitled to hold and occupy the entire tract of land as a homestead, regardless of its value, and this contention is supported by a more plausible argument than we should have thought possible in view of the plain provisions of the homestead act. A homestead within the meaning of that act, chapter 36, Compiled Statutes (Annotated Statutes, 6200), is defined and limited by the first section thereof, which is as follows:

"A homestead not exceeding in value \$2,000, consisting of the dwelling house in which the claimant resides, and its appurtenances, and the land on which the same is situated, not exceeding 160 acres of land, to be selected by the owner thereof, and not in any incorporated city or village, or instead thereof, at the option of the claimant, a quantity of contiguous land not exceeding two lots within any incorporated city or village shall be exempt from judgment liens and from execution or forced sale, except as in this chapter provided."

The first limitation imposed is that the homestead shall not exceed \$2,000 in value; the next, that it shall not exceed 160 acres of land not in any incorporated city or village, or, in lieu thereof, not exceeding two lots within such city or village. The head of a family might actually occupy more than 160 acres of land, not in an incorporated city or village, or more than two lots in such city or village, as a family homestead. But it will not be claimed that, in a case of that kind, the surviving spouse would take a life estate in the excess by virtue of the homestead

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act. The limitation as to value is as certainly and positively fixed by statute as the limitation as to quantity. Neither are we able to see that the surviving spouse has any greater rights when the claimant of the excess is an heir of the deceased instead of a creditor. The homestead, which vests in such survivor for life, is the identical homestead in quantity and value defined in section 1 of the act. The statute recognizes none other.

It is also contended that the county court erred in not taking into account the rights of the plaintiff under the provisions of section 22, chapter 23, Compiled Statutes (Annotated Statutes, 4922), to the effect that a widow who, at the time of her husband's death, shall be living therewith, and not owning in her own right a residence suitable to her condition in life, may remain in the dwelling house of her husband after his death, so long as she remains a widow, without being chargeable with rent. This contention is supported by no argument, and it will suffice to dispose of it to say that it is not presented by the pleadings.

It is recommended that the decree of the district court be affirmed.

GLANVILLE, C., concurs.

FAWCETT, C., not sitting.

By the Court: For the reasons stated in the foregoing opinion, the decree of the district court is

**AFFIRMED.**

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GEORGE GARTNER V. CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY.

FILED MARCH 17, 1904. No. 13,430.

1. **Lands:** ACTION FOR DAMAGES. One in possession of real estate, under a contract with the owner for the purchase thereof, has sufficient title to maintain an action for damage to the land.

2. ———: ———. In such case, it is not necessary for the plaintiff to show the precise nature of his contract, so long as it sufficiently appears that, at the time the damage accrued, he was in possession under a contract of that character.
3. **Error: Review.** Where the evidence on a vital proposition is erroneously excluded, it is not necessary for the party offering it to proceed to establish other propositions in his case in order to predicate error on such ruling.
4. **Successive Actions.** Where an obstruction causing the overflow of water and consequent damage to adjacent lands is of such a character that, unless interfered with by the hand of man, it will continue indefinitely, the damages, past and prospective, are recoverable in one action, and successive actions therefor can not be maintained.

**ERROR** to the district court for Pawnee county: **JOHN S. STULL, JUDGE.** *Reversed.*

*Storey & Storey*, for plaintiff in error.

*Hazlett & Jack*, *contra.*

**ALBERT, C.**

The petition states two cause of action: The first, so far as is material at present, is substantially as follows:

That in 1896, under and by virtue of a contract of purchase with the owner thereof, the plaintiff entered upon and took possession of certain real estate, and continued to keep possession thereof under said contract of purchase until 1898, when he paid the full amount of the purchase price, and the title in fee was conveyed to him by the owner; that the defendant's road extends through and across the above premises, and on the 11th day of March, 1897, the defendant negligently and carelessly caused a fire to be set out by one of its engines, whereby a certain orchard on said premises was wholly destroyed and the plaintiff damaged in the sum of \$355. The second cause of action is for damage for the negligent construction and maintenance of a roadbed or embankment across a ravine, whereby the surface water is accumulated and thrown back upon the plaintiff's land.

As to the first cause of action, so far as the questions raised in this court are concerned, the answer may be said to be a general denial. As to the second cause of action, the defendant entered a general denial, except as to some formal matters, and a plea of a former adjudication. The reply amounts to a general denial.

At the close of the testimony the court directed a verdict for the defendant, and the plaintiff brings error.

As to the first cause of action, the principal complaint of the plaintiff is based on the rejection of certain evidence offered by him to show sufficient title to enable him to maintain the action. The pleading and the proof show that he was not the holder of the legal title to the premises at the time the alleged loss occurred. Hence the case does not fall within the general rule stated in 13 Ency. Law (2d ed.), 432, to the effect that, in an action for damages for injuries to real estate, actual exclusive possession is sufficient evidence of title, unless the defendant shows an outstanding adverse title of higher dignity than a mere possessory one. In other words the plaintiff having shown an outstanding title in fee simple at the time the loss occurred, bare proof that he was in possession of the premises at the time would not make a *prima facie* case as to his right to maintain the action. He took the stand in his own behalf and testified that in 1894, and while his brother was the owner of the premises, he went into possession thereof—under what arrangement does not appear—and continued in possession until after the loss occurred, which was on the 11th day of March, 1897; that on the 24th day of December, 1896, and while he was thus in possession of the premises, he entered into a contract with his brother for the purchase thereof. He produced a letter which he testified to having received from his brother, which is as follows:

“BELOIT, WIS., Dec. 4, '96.

“DEAR BROTHER GEORGE: I received your letter of the 2, it found me well and I hope these few lines will find

you all the same. I will take \$30 an acre, you will have to measure the land. I think there must be 107 acres they have no right to tax a man for land if he has not got it you send me \$200 so I get it next week and the rest as you say in your letters. How many bushels of rye was there and what is it worth and how many bushels of corn is there and what is it worth. Is Kretzer there or have they moved away. I will close for this time. By by with love to all from your brother. HENRY J. GARTNER."

He testified that this letter was in reference to the premises in question, that he and his brother had previous correspondence with reference thereto, and that he bought the premises on the strength of that letter which he called his contract; that he made his first payment on the land December 24, 1896, and completed his payments thereon in 1898, and thereafter received a deed of conveyance therefor from his brother. Two other letters from his brother were produced and identified, which the plaintiff offered to show were in regard to the same transaction. They are as follows:

"BELOIT, WIS., Feb. 6, '96.

"DEAR BROTHER GEORGE: I received your letter of 2, it found us all well and I hope these few lines will reach you all the same. I am positive that I have made a deed to you for the land before we moved here on the north side of the R. R. You look up the records and see if not you will have to measure the land on the north side so I will now about how many acres there is so I can make the deed. You must have forgot tht I was to have intrist at seven per cent. for \$1,000 from Dec. 1, 1896, till it is paid; you have only sent me \$200 on the \$1,000 in Dec. so it will be more than \$870 till you get it paid. I will not be able to handle any corn for it is only fetching 25c a bu. here will you tell Lewis send me the receipt to make the salve that he makes I have lost the one he gave me. I do not know what the Pentacosts are doing with Bain I think C. F. Nigh the Co. Tr. at Pawnee City is appointed ad-

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ministrator over the property there so I think he will see about Bain. Has Bain any winter grain on Pentacosts land. ' By by your brother with love to all.

"HENRY J. GARTNER.

"If I remember correctly I mad a deed to you that you was to pay \$700 of the \$1,700."

"BELOIT, WIS., Oct. 25, '98.

"DEAR BROTHER GEORGE. I received your letter and draft it found us all well as usual and I hope these few lines will reach you all the same enclosed you will find the deed. Mr. Livermore said it will be just as good as to make a new deed and save the expense and time of riting a new deed and as for you to sending the tax receipts they are of no use to me since you have bought the place. I wish you would go to Pawnee City and pay the taxes on my lot 4 and part lot 3 you no which are my lots and see if there are any back taxes and straighten them up and send the tax receipts and I will pay you and se if the little three corner on the north side of the R. R. right away and on the south side of the S. E. corner block of the village of Gartner is taxes separate and are paid and about the land at Amboy Ill. I am not able to say anything unless I would go there; it will cost me about \$6 car fare to go thair besides my time it will take perhaps about 2 days; I had a man tell me that it must be the worst kind of marsh land for you can not get good land at any such figers. If you want me to look at that land I will tell you just what it is but you will have to give me the exact description of the land and I will look it up. So by by from your brother with best regards to all.

HENRY J. GARTNER."

The deed was also produced. It appears to have been acknowledged on the 2d day of February, 1896, and to have been originally made to another party, whose name is erased and that of the plaintiff substituted. These several letters and the deed were offered in evidence and excluded; the offer of the plaintiff to show that the second and third

letters referred to the land in question was also rejected. The exclusion of this evidence is now assigned as error.

The objections to the introduction of this evidence are couched in the most general language, and seem to have been made and sustained on the theory that the evidence offered was insufficient to show a complete contract of purchase between the plaintiff and his brother. Had it been necessary for the plaintiff to show the precise terms and conditions of such contract, this evidence doubtless would have been insufficient. But such was not the case. The question before the court at that time was not the precise nature of the plaintiff's contract with his brother, but whether plaintiff's title to the land at the time the loss occurred was sufficient to enable him to maintain the action. In his petition he alleged an equitable title, based on his possession of the premises under the contract for the purchase thereof, which would be sufficient title to enable him to maintain the action. *Omaha & R. V. R. Co. v. Brown*, 29 Neb. 492. The first letter contains an offer from the owner of the land of the terms upon which he would sell. The second is dated February 6, 1896, but from its contents it is clear that the date is a mistake and should be 1897. This letter shows that the owner of the land was preparing to execute a deed for the land to the plaintiff, and reminds him of the terms upon which payment is to be made. The third refers to an enclosed deed, and acknowledges receipt of a draft. Taking the letters and the deed, in connection with the plaintiff's evidence that he entered into possession on the strength of the first letter, and had fully paid for the land before he received the deed, and with his offer to show that the letters all refer to the land in question, it seems to us the evidence excluded would have strongly tended to show, to say the least, that the plaintiff at the time the loss occurred was in the possession of the premises under the contract with the owner for the purchase thereof, and should have been received. So far as the deed itself is concerned, the last letter shows that it was originally

made to another party, and that the grantor, in order to save expense, erased the name of such third party and inserted that of the plaintiff. Whether such change was made before or after the formal execution of the deed is not entirely clear, nor is it material for present purposes to inquire, because if ineffective as a conveyance of the legal title, there can be no doubt of its evidential value, taken in connection with the other evidence on the question whether the plaintiff was in possession under a contract of purchase. It is contended that the exclusion of this evidence was error without prejudice, because the plaintiff failed in his proof on other features of the case. This contention, we think, is without merit. One of the propositions which the plaintiff was required to establish, in order to recover on his first cause of action, was that he had sufficient title to the premises when the loss occurred to enable him to maintain the action. When his proof on that proposition was rejected, erroneously, we think, he was doomed to defeat, whatever proof might be forthcoming on other branches of the case. The law does not require vain things, and does not, therefore, require a litigant to furnish proof which could in no manner affect the result of the trial. This of course applies only to the cause of action in support of which the evidence was offered.

As to the second cause of action, it is pleaded as a defense, and conclusively shown in evidence, that soon after the construction of the roadbed or embankment, alleged to have caused the overflow of plaintiff's lands and consequent damage thereto, the then owner of the lands from whom plaintiff's title to such lands is derived brought an action against the defendant and another, asking judgment on these causes of action, one of which was for damage for injury to a part of said lands by reason of the negligent construction of such roadbed or embankment, whereby surface water was thrown back and over the lands. In that action, judgment was given generally for the plaintiff, which was subsequently paid.

The general rule is that, where the obstruction causing



the overflow of water and consequent damage to the land is of such a character that, unless interfered with by the hand of man, it will continue indefinitely, the damages, past and prospective, are recoverable in one action, and successive actions therefor can not be maintained. *Hodge v. Shaw*, 85 Ia. 137; *McGillis v. Willis*, 39 Ill. App. 311; *Pierro v. St. Paul & N. P. R. Co.*, 39 Minn. 451. The cause of action is single and indivisible, and when it passes into judgment, such judgment is a bar, not only to a subsequent action for the damages to the land actually litigated, but to a subsequent action for any such damage thereto as might have been litigated in the former suit. *Perry v. Dickerson*, 85 N. Y. 345; *Baird v. United States*, 96 U. S. 430; *DeWeese v. Smith*, 97 Fed. 309; *Bartels v. Schell*, 16 Fed. 341; *Beronio v. Southern P. R. Co.*, 86 Cal. 415; *Broxton v. Nelson*, 103 Ga. 327, 68 Am. St. Rep. 97. That such judgment is binding not only on the parties but their privies is elementary.

The obstruction complained of in this case is the same one that was alleged to have caused the damage in the former suit; it is of a permanent character, and one which will continue indefinitely unless interfered with by the hand of man. It follows, then, from what has been said, that the entire damage to the land, past and prospective, was recoverable in the former suit, and that the judgment rendered therein is a bar to the plaintiff's second cause of action.

There is one point of difference in the petition in the former case and that in the present which requires notice. In the former, a total lack of provision for carrying off the water is averred; in the present, it is alleged in effect that no such provision had been made save a certain ditch, which, it is alleged, was of insufficient capacity and fail to carry off the water, and which the defendant had permitted to become and remain obstructed. The ditch was constructed before the former suit was brought, and any faults in its original construction were part of the plaintiff's case at that time. Hence, not only the negligent construction

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of the road itself, but also of the ditch which was a part of the same project, is eliminated from the present case by the former adjudication. If, then, the plaintiff has a cause of action for the overflow of his land, it must be for such overflow as was occasioned by the obstruction of the ditch, as that is the only act or omission approaching negligence averred which is not included in the former adjudication. But there is a total failure to show what portion, or that any portion, of the alleged damage was occasioned by the omission to keep and maintain the ditch free from obstructions. It follows, then, that the defendant was entitled to the direction of a verdict so far as the second cause of action is concerned. But as the judgment and verdict are general, for the erroneous exclusion of the evidence offered by the plaintiff in support of his first cause of action, the judgment should be reversed and the cause remanded for further proceedings according to law.

FAWCETT and GLANVILLE, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is reversed and the cause remanded for further proceedings according to law.

REVERSED.

ROBERT JOHNSON, TRUSTEE, APPELLEE, V. SHERMAN COUNTY IRRIGATION, WATER POWER AND IMPROVEMENT COMPANY, APPELLANT.

FILED MARCH 17, 1904. No. 13,453.

1. **Appeal: REVERSAL.** Where, upon appeal of a suit in equity, the decree of the trial court in favor of the plaintiff is reversed and the cause remanded for further proceedings upon amended pleadings, nothing has become *res judicata*, or the "law of the case" binding on the trial court, except that the pleadings and evidence on the first appeal did not authorize the decree.
2. **Appurtenances.** The ruling made on the former appeal, that, "Where a mill is erected and a water-power obtained by the aid and cooperation of adjoining landowners, any right of flowage

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over their premises of water for the mill arranged for and contemplated by the owners, as subscribers toward its construction, becomes appurtenant to the mill," reannounced.

3. **Easement: PAROL AGREEMENT.** If one owning land traversed by a stream sells a portion thereof to another, and at the same time gives such other person by parol the right to overflow the remainder of the land by erecting a dam on the land so conveyed, and the purchaser, relying on such parol agreement, erects such dam and a mill operated by water, and maintains the same, the parol agreement becomes enforceable. If viewed as a license, the acts of the purchaser render the license irrevocable. If viewed as an easement, they take the grant out of the statute of frauds. *Newcomb v. Royce*, 42 Neb. 323, followed.
4. **Conveyance: CONSIDERATION.** The above rule applies as well where the mill site is conveyed in consideration of the erection of the mill, as where other consideration is paid therefor, and where the privileges given consist of other beneficial rights necessary to the use of the mill.
5. **Mortgage Foreclosure: SHERIFF'S DEED: EASEMENTS.** Where a sheriff's deed, made as the result of foreclosure of a mortgage, properly conveys realty consisting of mill property together with the appurtenances thereto belonging, the easements appurtenant to the mill property and necessary to its use and enjoyment, owned and used by the mortgagor in connection therewith at the time of the foreclosure, pass as appurtenances to the mill property.
6. **Lease: STATUTE OF LIMITATIONS.** Where, after conveyance of such property by sheriff's deed, the premises are leased by the purchaser to the mortgagor, possession of any portion of the property or its appurtenances, derived by third persons from the tenant, will not stop the running of the statute of limitations in favor of the lessor's title.
7. **Review: DECREE.** Record examined, and held to authorize the decree except as modified herein.
8. **Easement: RIGHTS OF OWNER.** An easement consisting of the right to maintain a mill-pond upon the land of another, does not deprive the owner of the land of any use thereof which does not interfere with the enjoyment of the easement.

APPEAL from the district court for Valley county: JOHN R. THOMPSON, JUDGE. *Reversed with directions.*

*R. J. Nightingale*, for appellant.

*O. A. Abbott*, contra.

GLANVILLE, C.

This case is before the court a second time on appeal by the defendants, having been once reversed by an opinion

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found in 63 Neb. 510, wherein it was remanded for further proceedings. A general statement of the matters in dispute is found in that opinion, to which we refer, mentioning herein only such other matters as are now involved. A new trial was had upon new pleadings, and new findings and decree were made in plaintiff's favor, different in some regards from the original decree. It is herein contended by defendants that certain matters retried by the district court had become *res judicata* by our former decision, and we take up this contention first. The question involved in this case is, what rights passed to the plaintiff by a judicial sale of the mill property involved, as appurtenances thereto? To be more specific, the rights in dispute are the rights, claimed by the plaintiff to have so passed, to flow land north of the mill site as a part of the mill-pond, the fee to which land was purchased by the mortgagor after the date of the mortgage which is the basis of the plaintiff's title, but which land was then so flowed; also the right to use a portion of the mill-race as then actually constructed, not upon land to which the mortgagor ever acquired the fee, together with a right to take water from the river in connection therewith. We think the scope and extent to which our opinion on the former appeal goes, as adjudicating the rights of the parties herein, is fairly shown by the following excerpts therefrom. "Plaintiff alleges an agreement, oral or in writing, between the various owners of the property affected and Schaupp, in the spring of 1887, to make to Schaupp an absolute title to the strip of land constituting the present race-way in consideration that Schaupp should erect the mill." "As before suggested, the question raised is as to the existence of title in the plaintiff to the strip of land claimed for a head-race in the north half of the section, and also as to the extent and character of the water right possessed by plaintiff." "It seems clear that the decree as it stands can not be sustained. It gives a degree of control to the mill-race as it now exists which only belongs to one who holds in fee. As above stated, the evidence is very far

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from disclosing any such title in any portion of the north half of the section on the part of plaintiff." "The state of facts in this case warrants no finding of an absolute and exclusive right in plaintiff to the dam and to the race-way, with its tow-head and sluice in the north half of the section." "It seems, however, clear that there was during all the time from 1887 until the irrigation company's purchase, with only temporary interruptions, some use of water privileges by the mill." "It would seem that plaintiff's rights in the premises depend upon something neither alleged nor shown by the evidence with any definiteness, viz., the rights held by John G. Schaupp in this mill-race and water-power on November 21, 1887, at the time the deed was made to Charles Moore and August Schaupp for his benefit, and the mortgage executed by them." "Some prior right to draw water from the river over the original race-way, as contemplated at the time of the subscription agreement, and as conveyed by Wall, with a right to condemn for additional race-way and mill-pond, and, when that is done, to have so much use of the water, seems to be the extent of plaintiff's rights. To vindicate them will evidently require an amended petition and a new trial. It is therefore recommended that the decree of the district court be reversed and set aside, the injunction dissolved, and the cause remanded for further proceedings. By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is reversed and set aside, the injunction dissolved, and the cause remanded for further proceedings. Reversed and remanded."

We are persuaded, and so hold, that plaintiff had, when the cause was thus remanded, a right to amend his pleadings by alleging any facts that would show any lawful right he claimed touching the things in controversy, and to introduce any competent evidence to establish those facts; that he was neither confined to, nor precluded from using the allegations in the former pleadings, nor the evidence produced on the former trial; that he might in the new trial prove any fact material to his rights,

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whether he had pleaded and failed to prove them before, or only failed to plead them. What was decided on the former appeal is, that the case made by the pleadings and evidence did not warrant the decree. If the pleadings and evidence now show that any of the rights in dispute belong to the plaintiff, he is entitled to have them awarded by the new decree.

The findings and decree now before us are specific and somewhat lengthy, covering 16 type-written pages. No good purpose would be subserved by copying the same or making any very close analysis thereof. The findings of fact justify the conclusions of law, so far as they are favorable to the plaintiff, under the rule announced in our former opinion: "Where a mill is erected and a water-power obtained by the aid and cooperation of adjoining landowners, and right of flowage over their premises of water for the mill arranged for and contemplated by the owners, as subscribers toward its construction, becomes appurtenant to the mill." And in *Newcomb v. Royce*, 42 Neb. 323: "If one owning land traversed by a stream sells a portion thereof to another, and at the same time gives such other person by parol the right to overflow the remainder of the land by erecting a dam on the land so conveyed, and the purchaser, relying on such parol agreement, erects such dam and a mill operated by water, and maintains the same, the parol agreement becomes enforceable. If viewed as a license, the acts of the purchaser render the license irrevocable. If viewed as an easement, they take the grant out of the statute of frauds." There can be no question but that the mill-race as now located is throughout nearly its entire length precisely where all the parties originally understood and agreed that it should be. It follows a natural channel that was the cause of the selection of the locality for a water-power. The contention that it was intended to tap the river further south is based upon the calls in a deed made after the channel was excavated. Such route was never surveyed or worked. There appears to have been a mis-

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take or misunderstanding in regard to these calls because they are made with reference to some wrong variation from the magnetic pole, but the only right of way given and used, or surveyed, is where the race is located. That is the route intended by the deed from Wall, and is where the new decree fixes the right of way. The mill-race across the land known as lot 2 in the section in question, or the Fries tract, is where it originally was, except that a sharp bend made on land so low that the banks would not always hold the water, was avoided by cutting across the bend on a little higher ground. This land was owned by John Wall when the agreement was made to furnish such right of way, to secure the location and erection of the mill. Schaupp's proposition was to build the mill for a donation of money, a mill site and "sixty feet for the head-race to the mouth of the channel." It appears from the findings of the court, which are supported by sufficient evidence, that Fries purchased this property from John Wall after the agreement with Schaupp to give the right of way for the mill-race; that Fries knew of the agreement and purchased the land without asking for its repudiation, allowed the mill-race to be dug in accordance with such agreement without objection, and the reason that no reservation of the right of way for the mill-race was placed in the deed from Wall to Fries, was not because of any mistake as to the location of the mill-race, for it was known that it would follow a well defined channel to the river, but because of a belief by both Wall and Fries that the land sold did not cover any part of that channel. Fries bought with knowledge of Schaupp's right in the premises under the contract with Wall, allowed valuable improvements to be made, based upon those contract rights, without objection, and is, we think, estopped to deny Schaupp's right to the mill-race. Perhaps he should even be held trustee of the legal title for Schaupp, or be required to specifically perform Wall's contract. Wall, under the evidence and findings, and the rules announced by this court above referred to, was

bound by his contract. Fries bought with a knowledge of all the facts, and therefore subject to the contract. The fact that when he bought he did not suppose his tract extended over any of the channel in question is immaterial, he knew of Schaupp's right to that channel.

The mill-race proper enters the land of Fries about 220 feet west of its southeast corner, runs nearly west-north-west some 600 feet, and connects with a natural channel of the Loup river which extends about northwest between the main land and an island, up beyond the Fries tract, and across the southwest corner of a tract then belonging to one Rounds, to the head of the island. The use of this channel was a necessary part of the proposed water-power scheme, and had been promised by the owners of the property throughout its entire length to Schaupp, in consideration of his locating and erecting the mill. At the time the mortgage herein referred to was taken, Rounds told the agent of the creditor who took the security "that he had agreed that Mr. Schaupp might use that water through there." That carries the right to the use of that channel down to where the channel entered the land of Wall, who was one of the active parties in securing the location of the mill, and had promised the use of the water in the channel, and the right of way from it for the mill-race.

There is another reason why the defendants can not prevail as to the right of way across the Fries tract. By Fries' testimony, Schaupp excavated the channel across his land in June, 1887. Schaupp remained in undisputed possession, and used the channel as an appurtenance to the mill, down to the time of the foreclosure sale, and whatever interest he had was appurtenant to the mill and passed by the sheriff's deed. Schaupp leased the property from the plaintiff, and was in possession of the entire plant under the lease. Whatever possession, if any, the defendants had in the ditch during the continuance of such lease, they acquired from Schaupp by contract, knowing him to be in possession as plaintiff's tenant.



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They could not hold possession so acquired adversely to plaintiff, especially without notice to him. Schaupp's possession under the lease continued until in July, 1897. Prior to that time, defendants holding their possession under plaintiff's lessee, were holding under plaintiff, and were estopped to claim adversely to the plaintiff, until they had surrendered the possession. At the time Schaupp surrendered his lease, the ten years' statute of limitations had fully run, and plaintiff's title to an easement of right of way for the mill-race had ripened under the statute. All of the rights which the new decree gives the plaintiff in the mill-race and works above the mill and mill-pond were, we think, clearly appurtenant to the mill at the time of the foreclosure sale, and passed as against the defendants by the sheriff's deed.

Turning now to the question of the rights of the parties as to the land north of the mill site flowed by the mill-pond within the high banks of Hawthorne creek, we find that the race discharges the water into the pond. That the mill wheel is fed from the pond is shown by the maps and diagrams of both parties. To fill the pond is impossible without flooding the land, and to use the power for the mill is impossible except the pond be filled. When Schaupp created the pond for the use of the mill, partly on the mill site and partly above it, the pond became an appurtenance to the mill, necessary and appropriate for use in connection therewith. If he had obtained title to the easement by donation toward the enterprise, it would have gone with the mill as an appurtenance. Having created the pond for use of the mill and then purchased the land it covers, while the fee in the land would not pass by sale of the mill and site, yet the easement of right of flowage, we think, would pass as an appurtenance to the mill property. The fact that Schaupp perfected his right to flow the land after the giving of the mortgage would not prevent it from so passing, the same as other betterments to the land in the form of buildings and machinery afterwards added to the premises, would so pass. Its use in connec-

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tion with the mill was open and visible. It was an *apparent* easement as that term is used in law. If Schaupp had owned and sold the mill at the date of the sheriff's deed, the easement would have passed by an implied grant. The owners of the fee continued to have the right to make use of the land in any way that did not lessen the enjoyment of such easement, but the mill property is the dominant estate. The decree gives plaintiff only such an easement. We are satisfied with the holdings of this court above referred to, and are content to follow them without further argument, and, applied to the facts in this case, we think they support the findings and decree of the lower court.

The trial court limited the rights of the plaintiff in the disputed property to such use as will yield for the mill 15 horse-power through the water power plant, upon the theory, as we understand, that our former decision prevented its giving to plaintiff a right to any greater flow than had been obtained at the date of the foreclosed mortgage. We do not so understand the matter. The donations of the rights acquired by Schaupp were for the mill he proposed to build. Though he had not at the date of the mortgage acquired sufficient flow to give him power to run the mill to its full capacity, if he had done so afterwards under the subscription agreement, we think he could not deprive the mortgagee of the power acquired and used in operating the mill, after sale of the mill and appurtenances under foreclosure. Mr. Schaupp, as a witness for the defendants, testified that soon after he turned the water to the wheel he could grind at "half capacity," and that the capacity of his mill required 40 horse-power. While he also testified that his first wheel would develop but 15 horse-power under a three foot fall, he also testified that he in some manner increased the fall and the power obtained. We think it well established from the evidence that the fall obtained is greater than three feet, and do not think the limitation of plaintiff to the use of 15 horse-power is just, under the evidence,

neither do we think the plaintiff has well established his right to the use of more water than is sufficient to develop 20 horse-power under the fall obtained.

The decree rendered preserves the rights of the parties in a joint use of the property, and water, and water right to the extent that such joint use is proper and right under the evidence, and should, we think, be affirmed except in the following particular. A joint use of the mill-pond as a reservoir seems necessary to the enjoyment of the several rights of each party, and is, we think, intended to be given by the decree. The plaintiff has only an easement to maintain the pond at its accustomed height; the enjoyment of such easement would not be disturbed by the defendants' use of the property, in which they own the fee, for the purpose of allowing water to flow in and out, provided they do not interfere with plaintiff's maintaining the pond at such height as to give him the power he is found to be entitled to. By the decree, before the defendants can so use the mill-pond, they will be compelled to make a canal on their own premises, diverging from the present canal and mill-race at the point where the present race enters the south half of the section, and a device to measure the water to which plaintiff is entitled is required to be placed at this point of divergence, to be maintained at the equal and joint cost of plaintiff and defendants. Plaintiff's mill-race discharges into the pond; if defendants' canal shall also discharge into the pond, it would be useless to measure the water which flows through plaintiff's separate mill-race. It must be true that the plaintiff, by knowing the capacity of his water wheel, may also know the height to which the water must be maintained in his flume to give him the specific power to which he has been found to be entitled. Instead of providing a measuring device, we think the decree should be modified so as to allow the plaintiff to use the quantity of water necessary to furnish such power, and to restrain him from using water in excess of such amount.

The decree should be so modified as to allow the plain-

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tiff the use of sufficient water to develop 20 horse-power instead of 15, also, so as to require the plaintiff to pay two-fifths instead of one-third of the cost of keeping up the plant, as provided by the decree; and further, by striking out the provision for maintaining a measure device, and, instead thereof, entering an order restraining the plaintiff from using more than the quantity of water required to produce 20 horse-power under the fall obtained by maintaining the pond at its accustomed height, this restriction, however, to take effect only after the defendants shall become entitled to the use of the pond by making their own canal leading thereto as provided by the decree. In all other respects, the decree should be affirmed.

We therefore recommend that the cause be remanded, with direction to the district court to modify its decree in the above particulars only, the decree to stand as entered in all other respects.

FAWCETT and ALBERT, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, it is ordered that this cause be remanded, with directions to the district court to modify its decree so as to allow the plaintiff the use of sufficient water to develop 20 horse-power instead of 15, also, so as to require the plaintiff to pay two-fifths instead of one-third of the cost of keeping up the plant, as provided by the decree; and further, by striking out the provision for maintaining a measuring device, and, instead thereof, entering an order restraining the plaintiff from using more than the quantity of water required to produce 20 horse-power under the fall obtained by maintaining the pond at its accustomed height; such restriction to take effect only after the defendants shall have become entitled to the use of the pond by making their own canal leading thereto in accordance with the decree; and in all other respects, that the decree stand affirmed.

JUDGMENT ACCORDINGLY.

THOMAS BONACUM, BISHOP, APPELLANT, V. WILLIAM  
MURPHY, APPELLEE.\*

FILED MARCH 17, 1904. No. 13,390.

1. **Ecclesiastical Tribunals: CIVIL COURTS: REVIEW.** The courts will not review the judgments or acts of the governing authorities of a religious organization with reference to its internal affairs, for the purpose of ascertaining their regularity or accordance with the discipline and usages of such organization, but they will inquire and determine whether or not a church tribunal, which undertakes to expel a member, has been organized in conformity with the constitution of the church, and whether a member of such tribunal is disqualified under the rules and canons of the church from sitting as a judge in the case. These questions are not ecclesiastical and within the exclusive jurisdiction of the ecclesiastical tribunal, although the decisions of such tribunal, if properly and legally constituted, would be binding on the civil courts on all matters properly before it for trial.
2. ———: **APPEAL: ENFORCING SENTENCE: INJUNCTION.** Where a church tribunal of original jurisdiction proceeds to try and discipline or expel a member of the society, and the member proceeded against claims that the presiding judge is disqualified from acting on account of a challenge interposed before the commencement of the trial, and where such challenge has been disregarded and an appeal has been taken by the accused to an appellate church tribunal, the civil courts have jurisdiction to enjoin the enforcement of a sentence pronounced against the accused until the appellate ecclesiastical tribunal has disposed of the appeal.
3. **Appeal: INJUNCTION.** Where the district court has enjoined the enforcement of a decree of an ecclesiastical court or the prosecution of any civil action against the accused, until an appeal taken by him has been determined by the appellate ecclesiastical court, it is immaterial whether such appeal is suspensive or devolutive, as the injunction must be observed and obeyed until the appeal has been disposed of.
4. **Evidence: REVIEW.** Evidence examined, and held to warrant the finding of the trial court that an appeal taken by the defendant had not been determined or disposed of.

APPEAL from the district court for Seward county:  
SAMUEL H. SORNBORGER, JUDGE. *Affirmed.*

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\* Rehearing allowed. See opinion, p. 487, *post*.

*C. E. Holland and Roscoe Pound, for appellant.*

*M. D. Carey and Norval Brothers, contra.*

DUFFIE, C.

The appellant, as bishop of the Roman Catholic church in the diocese of Lincoln, brought this action against the appellee, a priest of the mission of Seward in said diocese, to enforce the decretal order of the curia, the ecclesiastical court of the diocese, against the appellee for alleged wilful and continued disregard and violation of the canons, rules, regulations and discipline of said church, and for wilful disobedience to his superiors. For convenience the parties will be designated as in the court below, plaintiff and defendant.

The plaintiff's petition is in two counts, and sets out his cause of complaint in detail and at great length. The material allegations are, however, the following: After alleging that he is bishop of the diocese of Lincoln, which comprises that part of the state of Nebraska south of the Platte river, it is stated that the mission of Seward comprises certain real estate upon which is located a church and parsonage and also certain real estate and the church building thereon at Ulysses. In 1897 the defendant was appointed to this mission and took up his abode in the parsonage at Seward; that by virtue of the laws, canons, statutes, discipline, rules and regulations of the Roman Catholic church, the plaintiff is invested with the power and authority to transfer at his pleasure any priest, pastor or rector from any parish or mission within the diocese of Lincoln as an administrative act, and also, if required by the nature of the case, by a judicial act; that in the exercise of his prerogative he suspended and transferred the defendant from the mission of Seward on May 5, 1900, and thereafter appointed as rector or priest of said mission the Reverend John A. Hays; and that on April 5, 1900, in the exercise of his authority he trans-

ferred the defendant from the mission of Seward to that of Red Cloud, in Webster county, Nebraska; that it was the duty of the defendant under the rules and regulations of the church to immediately comply with such sentence of transfer upon the same being known to him, but that he failed and refused, and still refuses, to vacate and surrender to the plaintiff possession of the church and church furniture and fixtures, sacred vessels, vestments, and other church property belonging to the church in said mission of Seward. It is further alleged that on July 14, 1900, the plaintiff commenced an action in the district court for Seward county, reciting in his petition the foregoing facts and asking, among other things, that the defendant be restrained and enjoined from entering into either of said church edifices in said mission of Seward, and from exercising any of the rights of a priest or rector in said mission, and from collecting the revenues of said church in said mission and from hindering or in any manner interfering or preventing the Reverend John A. Hays from performing his duties as a priest or rector in said mission; that after a partial hearing in said cause and before the case was submitted to the court, the plaintiff dismissed that action without prejudice, but that, notwithstanding said dismissal, the court proceeded, wholly without jurisdiction, to render judgment in said cause; and it appearing to the satisfaction of the court that the defendant had appealed from the sentence and order of transfer and suspension made by the plaintiff on the 5th of April, 1900, and that no final decision had been made, or at least had not been promulgated on said appeal, the court, on the 6th day of January, 1902, acting wholly without jurisdiction, ordered and decreed that the plaintiff be enjoined from further proceeding in the civil courts until the defendant's appeal had been heard and determined by an ecclesiastical court having power and jurisdiction to hear and determine the same; and it is alleged that said appeal had been heard and determined by the sacred congregation of propaganda at Rome, the highest

court of the Roman Catholic church and the tribunal having power and appellate jurisdiction to determine the matter. The second count of the petition alleges that on January 23, 1901, the plaintiff, in the further exercise of his prerogative, excommunicated the defendant and expelled him from the jurisdiction of the diocese of Lincoln for misdemeanors committed and gross insubordination, which acts and misdemeanors are in violation of the laws, canons, statutes, discipline and regulations of the church; that notice thereof had been communicated to the defendant, and since that time defendant has had no right or authority to act or officiate as a priest or rector of the mission of Seward in any capacity whatever, or to hold possession of the church edifices, the sacred vessels, vestments, furniture and fixtures belonging thereto; that, notwithstanding this, the defendant, in defiance of the laws, canons and discipline of the church, has usurped the rights of said mission and of the priest and rector thereof, and forcibly intruded into each of the church edifices belonging to the mission, and assumed to exercise all the functions of a priest, and forcibly and wrongfully excluded from said churches and rectory the Reverend John A. Hays, and prevented him from officiating as priest of said mission; that he is collecting the revenues of said church; that plaintiff has exhausted all the resources known to the ecclesiastical law and is powerless to prevent the further unlawful acts of the defendant save in a court of equity; and he therefore prays that the defendant be restrained and enjoined by an order of the court from entering into any of the said church edifices or the rectory in said mission, or from exercising any of the rights and privileges of a priest therein, and from officiating or assuming to act as a priest or rector of the church in said mission of Seward, and from hindering or interfering with or in any manner preventing the Reverend John A. Hays from performing his duties as priest or rector of said churches in said mission.

The defendant in his answer admits that plaintiff is



bishop of the diocese of Lincoln; that the mission of Seward is in said diocese and comprises the parsonage and churches in Seward and Ulysses; that defendant took possession of the mission in 1897, and has ever since and does now reside in the parsonage at Seward; that since his appointment he has held possession of the mission and performed the duties of minister therein; he denies that the laws of the church have clothed a bishop with power at all times to remove a pastor from one mission to another in his diocese, and avers that under the laws of the church a pastor can not be removed against his will, except by a fair and impartial trial; he alleges that the plaintiff gave him notice to appear at Lincoln, Nebraska, on the 20th of March, 1900, to answer to charges preferred against him; that he appeared on that date and, before issues were joined, objected and challenged the right of the bishop to sit in judgment in the case, for the reason, among others, that the bishop was his enemy and prejudiced against him, and that within ten days thereafter he sent his objection, challenge and appeal to the highest church court, and that said objection, challenge and appeal have never been adjudicated by that court; he admits that again in October, 1900, he was summoned before the bishop in the second case, but he repeated the same objection, challenge and appeal, and immediately sent the same to the highest court of the church, and that the same has never been adjudicated by that court. In a supplemental answer filed by the defendant it is alleged that on January 6, 1902, the district court for Seward county rendered a judgment against the plaintiff in an action between plaintiff and defendant, which action was founded on the first ecclesiastical judgment mentioned and described in the petition in this action; that the judgment, among other things, enjoins plaintiff from commencing any other civil action involving the same controversy, until the defendant's appeal taken from the bishop's judgment has been determined by the highest ecclesiastical tribunal of the Roman Catholic church having power and jurisdic-

tion to hear and determine the matter complained of, and until the same is determined by the highest judicature of the Roman Catholic church. The defendant's answer is made a cross-bill, and affirmative relief is sought by way of an injunctive order against the plaintiff from in any manner or way interfering or intermeddling with the defendant as priest or rector of the church in the mission of Seward, until the challenges, protests and appeals of the defendant now pending and undetermined in the highest church court of the Roman Catholic church are finally heard and settled by said court.

The plaintiff's reply alleges that the decree and judgment of January 6, 1902, is null and void, for the reason that, before said cause was submitted to the district court, the plaintiff had dismissed his action and the court had no jurisdiction to proceed and enter judgment against the plaintiff. It is alleged that the defendant did not in that action file any cross-petition or set up any counter-claim or set-off that would entitle him to affirmative relief or give the court jurisdiction to proceed after the dismissal of plaintiff's case, and that said order was not made to enforce any ecclesiastical decision; it is further averred that the district court for Seward county had no jurisdiction to restrain the plaintiff as bishop from exercising his ecclesiastical rights in the government of his diocese in relation to the discipline of priests therein or the discharge of their ecclesiastical duties in the several parishes of that diocese; it is further alleged that the defendant has been lawfully convicted and sentenced to removal, suspension, excommunication and expulsion from the Roman Catholic church by an ecclesiastical tribunal of that church having power and jurisdiction to hear and determine the matter, and that such conviction and sentence, and each of them, have been finally determined by the highest judicial judicature of the church. On the final hearing, the court found all the issues against the plaintiff and in favor of the defendant, and entered a decree dismissing the plaintiff's petition.

The decree of January 6, 1902, entered in the prior action between these same parties, contains the following provision:

"It is further considered and decreed by the court, that, the plaintiff be and he hereby is enjoined and restrained from in any way or manner whatsoever interfering with or meddling with the defendant William Murphy as priest or rector of the Roman Catholic church within the plaintiff's Nebraska mission comprising the parishes of Seward, Nebraska, and Uylsses, Nebraska, and the said plaintiff is further enjoined and restrained from in any way or manner whatsoever commencing or prosecuting any suit or other proceeding in the civil courts on the matters complained of in his petition, until the defendant shall have been duly and lawfully convicted and sentenced by an ecclesiastical tribunal of said Roman Catholic church having power and jurisdiction to hear and determine the matters complained of, and until the same is determined by the highest judicial judicature of said Roman Catholic church."

It is claimed that the decree entered in that case, in so far as it afforded the defendant affirmative relief, is void, because of want of jurisdiction in the court to enter it. We have carefully examined the defendant's answer in that case and, while there is nothing therein denominated a "cross-bill," there are many allegations upon which affirmative relief to the defendant could properly be founded, and the defendant's prayer, based upon these allegations, asked the relief granted by the decree. That the court ought not to interfere with the regular exercise of his ecclesiastical duties by the bishop is too well established to need discussion, and if the decree be construed to enjoin the bishop from proceeding against the defendant in matters of church discipline, and in accord with the rules of the church, then, while we can not say that it would be absolutely void in that respect, it would be so irregular that effect ought not to be given it, unless its terms are so plain as to avoid any other construction. But that the

court had ample jurisdiction, under the circumstances, to enjoin the bishop from instituting and prosecuting further civil actions until defendant's appeal had been determined can not be doubted; and whether the decree was warranted by the evidence, or is one which should not have been made, is not a question now open to argument.

A somewhat analogous question was before the court in *State v. Baldwin*, 57 Ia. 266, and it was said:

"If these articles of discipline in any way qualify the right of the trustees to control the use of the house they should have been presented to the court in the injunction proceeding, and insisted upon as a reason why the order entered in that proceeding should not have been made. If they were called to the attention of the court in that proceeding, and notwithstanding the court erroneously ordered the trustees to do what is beyond their power, the order may, upon proper proceedings, be reversed. But the order of the court, even if erroneous, was not void. The court had jurisdiction of the parties and of the subject-matter and its adjudication can not be disregarded with impunity. So long as it remains unreversed it must be obeyed. There would be an end of all subordination and social order, if parties could disregard judicial orders, and when proceeded against for contempt, call in question the correctness of the order itself."

In our opinion the decree, in so far as it restrained the bishop from commencing an action in the civil courts until the defendant's appeal had been determined, was not beyond the power of the court to make, and that order should be enforced.

The two questions of paramount importance are, first, did the ecclesiastical court convened by the plaintiff at Lincoln have, under the circumstances, power or authority to proceed to judgment against the defendant; and, second, if so, have the appeals taken by the defendant been determined by the appellate ecclesiastical court? The law is well settled in this state that civil courts will not review or revise the proceedings or judgment of church

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tribunals, constituted by the organic laws of the church organization, where they involve solely questions of church discipline or infractions of the laws and ordinances enacted by its ruling body for the government of its officers and members. *Pounder v. Ashe*, 44 Neb. 672; *Bonacum v. Harrington*, 65 Neb. 831.

In *Pounder v. Ashe*, the rule announced in *Watson v. Jones*, 13 Wall. (U. S.) 679, relating to the power of the civil courts to inquire into the authority of an ecclesiastical tribunal, was followed and adopted. It was there said:

"It may be said here also that no jurisdiction has been conferred on the tribunal to try the particular case before it, or that, in its judgment, it exceeds the powers conferred upon it, or that the laws of the church do not authorize the particular form of proceeding adopted, and in a sense often used in the courts; all of those may be said to be questions of jurisdiction. But it is easy to see that if the civil courts are to inquire into all these matters, the whole subject of the doctrinal theology, the usages and customs, the written laws and fundamental organization of every religious denomination may, and must, be examined into with minuteness and care, for they would become in almost every case the criteria by which the validity of the ecclesiastical decree would be determined in the civil court. This principle would deprive these bodies of the right of construing their own church laws, \* \* \* and would in effect transfer to the civil courts, where property rights were concerned, the decision of all ecclesiastical questions."

This doctrine was reaffirmed in *Bonacum v. Harrington*, *supra*, and is now too well settled in this state to be questioned or doubted. Relying on this rule, the plaintiff insists that he being the governing authority of the diocese of Lincoln, his action in relation to the trial of priests and the enforcement of the rules and regulations of the church can not be questioned by the civil courts; that he has exclusive original jurisdiction in such matters, and that relief can be obtained only by an appeal to a higher

ecclesiastical body. When Father Murphy was called to answer before the curia or church court at Lincoln, he interposed a challenge to the plaintiff as the judge of said court, upon the ground, among others, that he was prejudiced against him and a bitter personal enemy. Defendant asserts that, when a challenge of this character is interposed, the matter of the qualification of the judge objected to must be submitted to arbiters, one to be chosen by the judge, one by the defendant, and, if they can not agree, a third is to be selected by them. In support of this contention he introduced a translation from the decretals of Pope Gregory IX, Book 2, title 28, chapter 31, as follows:

"Challenged judge must appoint arbiters upon whose determination of sufficiency depends whether he can act. You ask to be instructed, when one refuses a judge as suspected, whether he must allege the cause for suspicion, and whether he is bound to prove it unless it is manifest. Also whether the judge can proceed in the business, if he who made the objection of suspicion does not wish or can not prove cause in court. To your consultation we answer that, when anyone proposes that he has a judge who is suspected he allege the cause of suspicion before the same judge; but the parties should be compelled by the judge to agree on some persons not very distant; before whom if the case of suspicion is not proved within a suitable time, and not till then, shall the judge make use of his authority. But if the cause of suspicion is sustained by them, the judge objected to is bound to refrain from taking cognizance of the cause."

Defendant also introduced in evidence the decretals of Pope Gregory IX, Book 2, title 28, chapter 61, as follows:

"Challenged Judge,—continued: Because by a special care has it been provided for that no one may presume to promulgate against anyone a sentence of excommunication, unless a suitable admonition be previously given; wishing also to so provide that the party thus admonished may not under the pretext of a frustrating appeal be able

to evade the trial of him who gave the admonition: We enact that if he alleges that he has a judge who is suspected he shall assign in the presence of the same the cause of suspicion; and he together with his adversary (or if it happens that he have no adversary), then with the judge, shall together elect arbiters; or if they can not come to an agreement without malice, this shall elect one, and that the other, to take cognizance of the reason for suspicion; and if they can not come to an understanding they shall call in a third, in order that what two of them shall decree may have the strength of durability; and let them understand that they are bound to adhere faithfully to it by an order from us in virtue of obedience under a severe command. If the legitimate reason for the suspicion is not proved before them within suitable period of time, the judge may use his jurisdiction. But if it is legitimately proved, with the consent of him who alleged the reason of suspicion, the judge who is objected to must commit the affair to a suitable person or transfer it to a superior, in order that proceedings should go on in the manner prescribed."

This challenge interposed by the defendant raised not simply a question of the jurisdiction of the court to try the case, but of the disqualification of the judge presiding in the court. A court may have ample or even exclusive jurisdiction to try a case, and yet the judge presiding may, on account of bias or partiality or interest in the case or of his kinship to one of the parties, be disqualified to sit in the case. Such is the case in our probate courts. They have exclusive jurisdiction in probate matters, and yet the probate judge can not act in those cases where the statute disqualifies him. The question here for our determination is not whether the curia at Lincoln had jurisdiction, but whether the judge presiding therein was disqualified from trying this particular case. For the plaintiff it is contended that the decretal orders above quoted are not in force in the United States and are not applicable to the particular proceeding had against the defendant. A re-

view of the several authorities, church rules and decretal orders offered in evidence would unduly extend this opinion. It is sufficient to say that we are not satisfied that plaintiff's contention is upheld by the evidence and are entirely satisfied with the holding of the district court, the more so from the fact that the first idea in the administration of justice is that a judge must necessarily be free from all bias and partiality, and it would be a reflection upon the church to which both parties owe their allegiance, if it could be asserted and maintained that one put upon trial could not show the disqualification of the judge before whom he was cited to appear, but was compelled to submit his case to an interested party, or one so embittered against him that a fair trial could not be hoped for or expected. It is the rule of the civil courts that a judgment entered by a judge disqualified to act in the case is absolutely void. *Walters v. Wiley*, 1 Neb. (Unof.) 235, and cases cited. And if the canons of the church are to be regarded as the rules or statutes controlling the proceedings of the ecclesiastical courts, then, on principle, the same rule should apply to a sentence pronounced by an ecclesiastical judge disqualified from sitting in the case.

If we properly understand the record before us, it is claimed by the plaintiff that, in the proceedings, or at least one of the proceedings, had against Father Murphy, he was acting as a "judge delegate," and that a challenge or objection to a judge delegate does not oust him of authority to try the case. Referring to this phase of the case, we have to say that there is no allegation in the petition that in either of the proceedings brought against Father Murphy in the church curia at Lincoln the bishop was acting as a judge delegate, and a careful examination of the evidence fails to disclose any license or commission from any of his superiors vesting him with that authority. Both of the decrees made by the curia at Lincoln against the defendant are signed "Thomas Bonacum, Bishop of Lincoln, Judge Ordinary," and as we read the record of the proceedings had in those cases it was not claimed that



the plaintiff was acting as a judge delegate in either case. Indeed the record in the second proceeding seems to contradict that claim, as the following quotation taken therefrom will show:

"Before rendering a decision in the case of the *Diocese of Lincoln v. Rev. William Murphy* now before this curia, we deem it proper first of all to pass upon the exceptions and the alleged appeals which the Rev. Murphy claims to have made, and by which he pretends that this curia is deprived of all jurisdiction over him. (See Exhibits F and K.) In his answer to the citation of December 10, 1900, he says: 'I beg to inform you again that in all the matters referred to, you have lost all jurisdiction by my appeal and challenge of March 20 (1900) and by my appeal of October 1, 1900.' As regards the alleged challenge of March 20, 1900, we have to say—as the record of the curia will also show—that no challenge was made on March 20, 1900. If any challenges have been made since that time they are to be regarded as irregular and invalid, inasmuch as they set forth no reasons why the challenge is made. Where a judge *delegate* is challenged it is not necessary to give any reasons for the challenge; but where a judge *ordinary* is challenged it is necessary to set forth the reasons in writing, otherwise the challenge may be disregarded with impunity. (See De Angelis De Recusationibus, L. II, Tit. XXVIII; Smith's Elements II, No. 1038.)"

A consideration of these matters makes it apparent to us that the bishop in the proceedings referred to was acting as judge ordinary and not as judge delegate, and has so represented and designated himself by the record of his own court.

The court did not intend by the language used in *Watson v. Jones*, *supra*, to establish a rule depriving a member of a church society of a right to resort to the courts in cases where those pretending to act for the society have absolutely no right, authority or power. This is well illustrated by the holding in a later case, *Bouldin v. Alexander*, 15 Wall. (U. S.) 131. It is there said:

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"This is not a question of membership of the church, nor of the rights of members as such. It may be conceded that we have no power to revise or question ordinary acts of church discipline, or of excision from membership. We have only to do with rights of property. As was said in *Shannon v. Frost*, 3 B. Mon. (Ky.) 253, we can not decide who ought to be members of the church, nor whether the excommunicated have been regularly or irregularly cut off. We must take the fact of excommunication as conclusive proof that the persons excised are not members. But we may inquire whether the resolution of expulsion was the act of the church, or of persons who were not the church, and who consequently had no right to excommunicate others. And, thus inquiring, we hold that the action of the small minority, on the 7th and 10th of June, 1867, by which the old trustees were attempted to be removed, and by which a large number of the church members were attempted to be excised, was not the action of the church, and that it was wholly inoperative. In a congregational church, the majority, if they adhere to the organization and to the doctrines, represent the church. An expulsion of the majority by a minority is a void act."

*Hatfield v. De Long*. 15 Ind. 207, 51 L. R. A. 751, is a good illustration of the rule that the civil courts will interfere to prevent a trial by an ecclesiastical court, the members of which are disqualified to sit in the case. The petition in that case alleged the following facts: The appellant was, on a trial had, expelled from the society. He took an appeal to the quarterly conference. The organic law of the society authorizes an appeal to the quarterly conference but no higher. It provides that on appeal the trial shall be had before a tribunal of five, two to be chosen by the accused, two by the quarterly conference, and a fifth by the four: That no person shall sit as a member of the appellate tribunal who sat in judgment at the original trial: That a decision of a majority of the appellate tribunal shall be final, and that any member who refuses to abide by such decision shall be expelled without

further trial. Appellees constitute the quarterly conference. Appellant chose two competent persons to act as members of the appellate tribunal. Appellees, with the fraudulent purpose of depriving appellant of the benefits of his appeal, selected two of their number to act as members of the appellate tribunal who had sat in judgment at the original trial. These two refused to consider the selection of anyone as the fifth member of the appellate tribunal except a certain person who is in the conspiracy to deprive appellant of the benefits of an appeal, and whose purpose is to join the other two in denying appellant a fair hearing. A demurrer to this petition was sustained by the trial court, but this holding was reversed on appeal; the court, after stating and recognizing the general doctrine that the civil courts will not interfere to review the decision of an ecclesiastical court, gave the following reasons for reversing the trial court:

"The foregoing considerations, however, do not dispose of this appeal. The cases that have been spoken of presupposed the existence of an ecclesiastical judicatory in accordance with the organic law of the church. The member, by joining, agrees that the church shall be the exclusive judge of his right to continue. For the purpose of trying a member on charges of having violated the rules of the church or the laws of God, the church is the tribunal created by the organic law. The member has consented that, for all spiritual offenses, he will abide the judgment of the highest tribunal organized under the constitution of the church. But he has not consented to submit to usurpation. As Mr. Justice McCabe said in *Smith v. Pedigo*, 145 Ind. 361, 407, 32 L. R. A. 838, 843: 'It must be the act of the church, and not the act of persons who are not the church.' In this case, it is disclosed that appellant has proceeded as far as he can within the church. He was compelled either to submit his appeal to a tribunal organized in defiance of the constitution of the church, or to appeal

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to the secular courts. If the secular courts are without jurisdiction to grant relief, it is apparent that, on the facts alleged in the complaint, the question of appellant's guilt or innocence of a spiritual offense will be determined by an unconstitutional tribunal. This court will have nothing to do with the charge of a spiritual offense. That is an ecclesiastical question purely. But the inquiry, whether or not the tribunal has been organized in conformity with the constitution of the church, is not ecclesiastical. It is the same question, and that only, that may arise with respect to any voluntary association such as fraternal orders and social clubs. The assertion of jurisdiction in such a case is not an interference with the control of the society over its own members; but, on the contrary, it assumes that the constitution was intended to be mutually binding upon all, and it protects the society in fact by recalling it to a recognition of its own organic law."

In the celebrated case of *Chase v. Cheney*, 58 Ill. 509, some question was made as to the constitution of the court by which the appellant was tried. In the opinion delivered by Mr. Justice Thornton, language was used indicating that the civil courts would not inquire into the legality of the organization of the ecclesiastical court. Chief Justice Lawrence and Mr. Justice Sheldon, while fully concurring in the conclusion reached, filed a separate opinion, giving their views upon that question. They say:

"We understand the opinion as implying, that in the administration of ecclesiastical discipline, and where there is no other right of property involved than the loss of the clerical office or salary, as an incident to such discipline, a spiritual court is the exclusive judge of its own jurisdiction, under the laws or canons of the religious association to which it belongs, and its decision of that question is binding upon secular courts. This is a principle of so grave a character, that, believing it to be erroneous, we are constrained to express our dissent upon

the record. We concede, that when a spiritual court has once been organized, in conformity with the rules of the denomination of which it forms a part, and when it has jurisdiction of the parties and the subject matter, its subsequent action in the administration of spiritual discipline will not be revised by the secular courts. The simple reason is, that the association is purely voluntary, and when a person joins it he consents, that for all spiritual offenses, he will be tried by a tribunal organized in conformity with the laws of the society. But he has not consented that he will be tried by one not so organized, and when a clergyman is in danger of being degraded from his office, and losing his salary and means of livelihood by the action of a spiritual court, unlawfully constituted, we are very clearly of opinion he may come to the secular courts for protection. It would be the duty of such courts to examine the question of jurisdiction, without regard to the decision of the spiritual court itself, and if they find such tribunal has been organized in defiance of the laws of the association, and is exercising a merely usurped and arbitrary power, they should furnish such protection as the laws of the land will give. We consider this position clearly sustainable, upon principle and authority."

On the first hearing in *Pounder v. Ashe*, 36 Neb. 564, it was held that this court would inquire whether or not the organic rules and forms of proceeding prescribed by the ecclesiastical body have been followed. In other words, whether a court properly constituted and having jurisdiction of the matter before it had proceeded in a regular manner with the trial. On the rehearing it was held that, after the highest ecclesiastical court had determined that the court of original jurisdiction had proceeded regularly and had affirmed its finding, this court would not review such holding. It will be noticed however that in that case the highest court known to the church society to which Ashe belonged had affirmed the proceedings of the trial court, while in the case at bar

the appeal taken by Father Murphy from the judgment of the curia at Lincoln had not been determined at the time the injunction was issued, and that decree only attempted to stay the hand of the bishop until the appellate ecclesiastical court had passed upon the question.

In *Watson v. Jones, supra*, and in the cases heretofore coming before this court, the opinions have proceeded upon the theory, either that the highest court of the church had settled the question of jurisdiction, or that the court whose judgment it was sought to review had been properly and legally constituted, and that no appeal had been taken from its decision. The rules governing Catholic church trials are much more liberal in behalf of the accused than are those prevailing in the civil courts, it being laid down that the omission of a substantial formality vitiates and annuls the judgment pronounced. In Smith's New Procedure, which both parties cited as authority in Catholic church trials, it is said in article 43, section 2:

"The rule of law is '*quæ contra jus fiunt debent utique pro infectis haberi*,' hence all canonists teach that the omission of a *substantial formality* during the trial vitiates and annuls the entire proceeding. \* \* \* When the trial is null by defect in the proceedings, the sentence passed after such trial will also be null and void and have no effect whatever. For the law prescribes indeed that the guilty shall be punished, but it prescribes also that they shall be punished by the forms of law. These forms are considered by the law the essential means of finding out the truth."

In *Pounder v. Ashe, supra*, this court has adopted the rule that, where the construction of a canon or rule of the church is in controversy, it will accept the construction put thereon by the highest church authority, and that, where the regularity of the proceedings of an inferior ecclesiastical court are passed on by the highest governing authority of the church and the regularity of the proceedings sustained, this court will accept such decision as final and conclusive. And in *Bonacum v. Harrington, supra*, it was

held that the decree of the highest church power in the state when not appealed from, would also be accepted by the court as a correct exposition of the question in controversy; but we have never gone so far as to say that we would enforce the orders of an ecclesiastical court, the members of which are disqualified from acting, or that we would accept as conclusive the construction put upon the canons and rules of the church by an inferior ecclesiastical tribunal, when that construction was a matter of controversy, and an appeal had been taken therefrom to a higher ecclesiastical body, and was still a matter for the decision of the highest governing authorities of the church. The parties have devoted considerable time to the question whether, under the rules governing church trials, an appeal taken from the decrees of the curia at Lincoln would have the effect of staying the execution of such decrees. A review of the evidence offered by the parties is rendered unnecessary for the reason that, by the injunctive order of January 6, 1902, the plaintiff was prohibited from bringing a civil action against the defendant until the appeal then taken had been determined by the highest church authority, and this injunction had never in any manner been set aside or modified.

Before proceeding to examine the evidence relating to the decision of the appeal taken by Father Murphy from the order or decree of the bishop, we might premise by saying that it is the plaintiff's contention that no challenge was interposed by the defendant to the qualification of the bishop to sit as a judge in that case, and it is said that Father Murphy, at the time and before pleading to the charge against him, desired to read a "statement," and that he at no time interposed or offered to read a "challenge." The record shows that when called upon to plead, Father Murphy asked to read a statement, but this privilege was denied him, and he was told that he would have opportunity after entering his plea to the charge to make such statement as he desired. He then attempted to read his statement, but was interrupted and great confusion

prevailed; he then attempted to file the statement with the secretary of the court, but this was refused under the direction of the plaintiff. This statement, or a copy thereof, is in the record before us, and it plainly contains a challenge setting forth numerous reasons why the plaintiff should not sit in the trial of the case. When the plaintiff says that Father Murphy did not interpose a challenge, that he merely offered a statement, he is making a play upon words, it being evident that it was known that this statement was in reality a challenge which, according to the forms of procedure formulated by the Roman Catholic church for the trial of cases, had to be interposed before the defendant entered a plea to the charges against him.

In Droste-Messmer, Canonical Procedure, chapter 3, article 2, it is said: "Recusation is only a dilatory not a peremptory exception, and must be made in writing to the judge himself before the public pleading begins. After that time the recusant can enter this plea only upon making an affidavit that he had no knowledge of the reasons for the challenge before, or in case the grounds of the challenge arose, only afterwards." In a note to this article it is said: "It is the nature of a recusation that it must be made before the person thus challenged begins to exercise his jurisdiction. To let him do this would be to admit his authority."

The argument, therefore, that there was no challenge, or that it was not offered at the proper time, is wholly without foundation and needs no further discussion. What is claimed to be an order of the sacred congregation of the propaganda fide disposing of Father Murphy's appeal, is contained in a letter addressed to the bishop of date April 13, 1901, and signed by Cardinal Ledochowski and Aloysius Veccia, which is as follows:

"SACRED CONGREGATION OF THE PROPAGANDA OF THE FAITH.

"Protocol No. 43771.

ROME, April 13, 1901.

"Concerning the appeal of Rev. William Murphy.

"RT. REV. AND DEAR SIR: In reply to your letter of the



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18th of March last, in which you make inquiry as to whether Rev. William Murphy, a priest of the Diocese of Lincoln, had appealed to this Sacred Congregation of Propaganda against a sentence of your Diocesan Curia, I have to inform you that the aforementioned priest did on the 20th of March, 1900, forward an appeal, but it was rejected; and that again on the 1st day of October, 1900, he made another appeal against a mandate which you had issued to him in your letter of the 29th of September of the same year, but that appeal was likewise rejected.

"Praying Almighty God to keep you in his holy keeping,

"I am, Rt. Rev. and dear Sir,

"Your most devoted Servant,

"M. CARDINAL LEDOCHOWSKI,

"ALOYSIUS VECCIA, *Secretary.*"

It is claimed that this is the original order disposing of Father Murphy's appeal, and in support of this theory the deposition of Francis Merchetti, auditor of the apostolic delegation to the United States and acting apostolic delegate for the church in the United States, was taken. He testifies that Cardinal Ledochowski was, at the date of the letter, prefect of the sacred congregation of propaganda fide and that Aloysius Veccia was secretary thereof. He states (and this is conceded by the parties) that the sacred congregation of the propaganda fide at Rome is the supreme tribunal for the determination of all questions relating to the spiritual and temporal affairs of the Roman Catholic church in the United States; that the officers of said tribunal are the prefect and secretary; that the decisions of the propaganda being determined, it is reduced to writing signed by the prefect and secretary and the original document is forwarded to one of the parties interested. He further states that the letter above set out is not a copy, but the original decree or decision entered in the case. This evidence is all objected to as incompetent, and we incline to the belief that the objection was well taken. We know of no court which is not required to keep some

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record of its proceedings. In the trial had in the curia at Lincoln a very complete and minute record was made of all the proceedings in the case, and if there is a court ecclesiastical or of other kind which fails to make a record of its orders and decisions, then certainly the best evidence of what such unrecorded orders and decisions may be is the evidence of a member of the court. If the rules of the court require its decisions to be recorded, then a copy of the record properly identified is the best evidence of the decision: But if the rules do not require such a record to be made, we are unable to see how anyone except some member of the court participating in the decision is qualified to say what that decision is or was. The letter on its face shows that it was written in reply to an inquiry made by the plaintiff herein, and does not purport to be a decision of the appeal, but speaks of that decision as a past event, something that had taken place prior to the writing of the letter. The language is: "I have to inform you that the aforementioned priest did on the 20th of March, 1900, forward an appeal, but it was rejected, and that again on the 1st day of October, 1900, he made another appeal against a mandate which you had issued to him in your letter of the 29th of September of the same year, but that appeal was likewise rejected." The letter clearly speaks of the decision on these appeals as having been made at some time prior to the writing of the letter, and can not, as we see, be construed as an order then made rejecting these appeals or affirming the orders appealed from. Other letters from Rome were also offered touching this appeal, as well also as a document certified by a notary whose certificate was further attested to be in due form by officers of the government of Italy, in which he states that, at the request of Monsignor Veccia, secretary of the sacred congregation of the propaganda fide, he went to the secretary's office and was there shown a letter by the custodian of the archives addressed to Bishop Bonaicum, a copy of which shows it to be the same letter above copied. This evidence was clearly incompetent, as we

know of no statute or rule of the common law which admits a certificate of a notary, however solemnly attested by other officials, to be received as evidence of matters of this character or of any matter except acts of their own committed to them by the laws of the state or country where they reside. In this connection it might be mentioned that a commission was taken out of the district court by the defendant, directed to Hector de Castro, our consul general at Rome, to take the deposition of Cardinal Gotti who, it appears, succeeded Cardinal Ledochowski as prefect of the sacred congregation of the propaganda fide, and of Monsignor Veccia and Monsignor Onronini, one of the objects being, as shown by the interrogatories propounded, to ascertain what disposition had been made by the sacred congregation of the propaganda fide of the appeals of Father Murphy, and this commission was returned by the consul general, with a statement that "he had personally interviewed each of the witnesses, who declined to answer their respective interrogatories, availing themselves, in their official position, of the rights conferred on them by the Laws of Guarantee of the Kingdom of Italy." It would appear from this return that these witnesses are not compelled to give evidence in this manner by the laws of the country where they reside. It may be that the plaintiff knew of the exemption extended to the officials composing the sacred congregation of the propaganda fide by the laws of Italy, and on that account made no effort to secure their evidence, and relied, and was compelled to rely, on the evidence contained in the bill of exceptions in his attempt to show that the defendant's appeal had been disposed of. If this be the case, he can not probably be charged with negligence in failing to obtain competent evidence to show what, if any, disposition has been made of that appeal; still, so long as he has not obtained and offered legal evidence determining the question, he is in the same position as any other litigant upon whom is cast the burden of proof upon a material issue of fact, and who is unable to sustain that burden because of the death of

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the only witness who knew the fact, or the refusal of the witness to testify where the court has no means of compelling him to do so. In other words, where a party upon whom is cast the burden of proof is unable to furnish competent evidence, the court can not treat such inability to produce the evidence as an equivalent of the evidence itself.

It will be noticed, also, that the decree in the previous case, enjoining the plaintiff from commencing this action until the disposition by the appellate ecclesiastical tribunal of defendant's appeal, was entered on the 6th of January, 1902. The letter of Cardinal Ledochowski is dated April 13, 1901. If the defendant's appeal had been disposed of in the manner indicated by that letter, such disposition, being prior to the decree of January 6, 1902, should have been interposed as a defense to defendant's prayer for affirmative relief in that action. That decree, so long as it remains undisturbed, is an adjudication that on January 6, 1902, defendant's appeal from the judgment of the ecclesiastical tribunal at Lincoln had not been disposed of, and by that decree the fact that defendant's appeal was still pending on January 6, 1902, was *res judicata* for the purposes of this case. It was still open to the plaintiff to show that the appeal was disposed of subsequently to January 6, 1902, but he was precluded by the decree of that date from showing that it had been disposed of as early as April 13, 1901.

Because, as we think, the decree sought to be enforced was one entered by a judge disqualified to act, and further, because by the terms of the injunction of January 6, 1902, the plaintiff was enjoined from bringing this action until the appeal taken by Father Murphy had been determined, and the evidence failing to show that the appellate court has passed upon that question, we recommend that the judgment of the district court be in all things affirmed.

FAWCETT, GLANVILLE and ALBERT, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is in all things

AFFIRMED.

The following opinion on rehearing was filed June 22, 1905. *Former judgment vacated and action dismissed:*

1. **Courts: TRIAL OF TITLE TO PROPERTY: PARTIES.** The courts will not entertain a controversy concerning the title or right of possession of real or personal property, except at the instance of some person or persons having or claiming a right thereto derived from, or recognized by, the laws of this state or of the United States.
2. **Ecclesiastical Trials: REVIEW.** The courts of this state will not review the process or proceedings of church tribunals for the purpose of deciding whether they are regular or within their ecclesiastical jurisdiction, nor will they attempt to decide upon the membership or spiritual *status* of persons belonging or claiming to belong to religious societies.

AMES, C.

With an exception disclosed by the following discussion, the former opinion, *ante*, p. 463, contains a sufficiently accurate and ample exposition of the record in this case, and its reproduction here is not requisite. The authorities cited in that opinion seem to us also to suffice for the disposition of the action, although the conclusion we draw from them is the exact opposite of that there reached. The plaintiff styles himself in the title to his petition, and elsewhere in that document, "as bishop of the Roman Catholic church of the diocese of Lincoln," and seeks to recover in that capacity and not otherwise. The substance of the petition is that the defendant is, or was, a priest of the church and subject to the episcopal jurisdiction of the plaintiff, and that the plaintiff acting in his official capacity ordered the transfer of the defendant from Seward, Nebraska, where he had formerly been ministering, to Red Cloud, Nebraska, for like service, and that the defendant persistently refusing to obey the order, the plaintiff first suspended him from his priestly func-

tions, and afterwards pronounced against him the so-called greater excommunication which, it is said, assumes to interdict him from all Christian fellowship both in this life and in the life to come. It is further alleged that the defendant still remains contumacious and refuses to desist from his ministrations at the so-called "mission" of Seward, which includes a parish church building and parsonage at Seward, in Seward county, and a parish church at Ulysses, in Butler county. The prayer is, in brief, that the defendant may be enjoined from a continuance of the conduct complained of, and, incidentally, that he be required to turn over and deliver to the plaintiff the real estate mentioned and certain chattels, and that the title thereto *as against the defendant* may be quieted in the plaintiff.

Where the title of the property, or any of it, now is, or what lawful authority the plaintiff has over or concerning it, the petition does not aver. It is asserted by his counsel that he is a legal or equitable trustee of it, but the petition does not set forth any declaration of trust nor any facts or circumstances from which the law raises a constructive or resulting trust, so that the sole issue tendered by the petition is as to the spiritual or ecclesiastical *status* of the defendant as determined by the "laws, canons, statutes, discipline, rules, regulations and customs of the Roman Catholic church."

In the attitude of the pleader the matter of transference, or attempted transference, from one mission to another, has long ceased to be of importance, and it is manifest that if his contention is upheld, the defendant is not less disqualified from exercising the priestly office elsewhere than he is so at Seward and Ulysses. And it is solely because of his excommunication from the church that he is disqualified from exercising it there. So that the sole question which the court is asked to decide is, whether the defendant is catholic or recusant. All other relief sought by the petition is incidental to the determination of that controversy. Now the authorities cited in the

former opinion are unanimous to the effect that this is a question with which the lay courts in this country will have nothing to do. The only discordant note is the dissenting opinion of Judges Lawrence and Sheldon in *Chase v. Cheney*, 58 Ill. 509, 11 Am. Rep. 95; but whoever will read the majority opinion in that case will be convinced, we think, that the position of the remaining five judges, among whom were Judges Breese and McAllister, is invulnerable. The case did not differ essentially from that before us. An ecclesiastical court was proceeding, it was alleged irregularly and illegally, as regarded by church laws, to try and depose the plaintiff from the ministry so as to deprive him of the right to officiate or receive a salary as a clergyman of that denomination, and it was held that, inasmuch as the substantive question at issue was his *status* in the society, the courts would not interfere, although his salary and livelihood were dependent upon the decision of the church authorities.

The answer in this case begins by protesting that the petition does not state facts constituting a cause of action, and then proceeds by way of cross-petition to allege that the defendant, according to the laws, canons, statutes, rules, etc., of the Roman Catholic church has not been deprived of his *status* of a priest of that church, because his alleged excommunication, on account of the prejudice and disqualification of the bishop who pronounced the sentence, is void, and because it has been temporarily taken off or suspended by an appeal to a church court at Rome. "And that the said control, custody or administration of various properties of said Roman Catholic church, remaining always one and the same, is vested directly or indirectly, proximately or remotely, particularly or generally in all of the three following ecclesiastical persons in various degrees and at the same time, namely, in the pope, in the bishop, in the pastor, priest or rector of the said Roman Catholic church according to the laws, canons, statutes," etc., of that church, and that he is, and

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has been, the pastor or rector of the mission of Seward according to the laws, canons, rules, etc., of said church, and therefore one of the persons entitled to the control thereof.

Whether or not these averments mean anything to a churchman we confess ourselves unable to say, but they are certainly without meaning to the courts of the state. Like the bishop, the defendant omits to say where the title to the property is, or to set forth any declaration of trust, or any facts or circumstances raising one by implication of law. But it is alleged that, in a prior suit, the defendant obtained from the district court a perpetual injunction restraining the bishop from again litigating any of the matters referred to, in the state courts, until the alleged appeal should be finally disposed of in the tribunal to which it was made.

This injunction strikes us as not the least remarkable of the proceedings under review. Let it be supposed to be valid, as it was held to be by the former opinion, and let it be supposed, also, that it shall finally be determined upon its merits and the decision made of record and exemplified in a satisfactory manner; and one of two consequences will be inevitable: either the courts of this state will sit in review of it as upon appeal, or, more properly, *certiorari*, a thing which reason and the authorities are unanimous in saying they can not do, or else they will humbly and unhesitatingly register and enforce the decree or sentence of an independent and alien power, having its seat of spiritual and temporal sovereignty in the ancient city of Rome; a proceeding for which there is no precedent in the United States, nor, it is believed, in any court whose records are written in the English language. But if neither of these consequences is admitted, then the injunction has no practical end or aim, and deals with no controversy of which the courts of this state can rightfully take cognizance, and is wholly void. And so we esteem it to be.

The second opinion in *Pounder v. Ashe*, 44 Neb. 672, a



leading case on the subject in this state, and which cites the principal leading cases thereon in other jurisdictions, so far from sustaining the former decision, is in direct conflict therewith. That case, as we gather from the somewhat meager statement of facts in the earlier decision in 36 Neb. 564, was begun by the trustees of a local protestant church society incorporated under the laws of this state. Their complaint was that no one could, according to the constitution and laws of their society, which derived their force and obligation from the statutes of the state, rightfully be employed or officiate, as pastor, in the property under their charge, unless he should be a member in good standing of their society and have the sanction and authority of a representative body, called in the opinion a conference. And it was alleged that Ashe had been expelled by the conference, but still persisted in officiating in the church buildings against the wishes and protest of the plaintiffs, who were unable to prevent him so doing without the aid of the court. The defendant contended that the proceedings of the conference, at the time of his removal from the ministry, were upon charges not constituting an offense against the discipline of the society, and that the proceedings were so irregular and informal that the body trying him did not acquire jurisdiction of the subject matter. With this defense, this court, in an opinion by the then Chief Justice HARRISON, expressly declined to have anything to do, quoting with approval the following from *German Reformed Church v. Seibert*, 3 Pa. St. 282:

"The decisions of ecclesiastical courts, like every other judicial tribunal, are final; as they are the best judges of what constitutes an offense against the word of God and the discipline of the church. Any other than those courts must be incompetent judges of matters of faith, discipline, and doctrine; and civil courts, if they should be so unwise as to attempt to supervise their judgments on matters which come within their jurisdiction, would only involve themselves in a sea of uncertainty and doubt, which would do anything but improve either religion or good morals."

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The court considered that it sufficed for the disposition of the case that the body, whose authority the trustees of the title were bound to respect, and who were empowered by the constitution of the society to decide upon the qualifications of the defendant, had condemned him. Whether the condemnation was regular or irregular, or with or without jurisdiction, or just or unjust, the court refused to inquire; it was enough to know that the sentence was pronounced by a body to whom authority was committed by the society for pronouncing a like sentence in any case. The court, having before it the persons recognized by law as having or representing the legal title to the property in dispute, contented itself with protecting such persons in its peaceable possession and enjoyment for the uses to which it had been devoted, and under the direction of the authorities designated by the articles of the association or discipline for its government. Such, we think, is the consensus of judicial opinion in this country.

The only recent case that has been brought to our attention that lends color or countenance to the former decision is that of *Bonacum v. Harrington*, 65 Neb. 831. The opinion in that case is seemingly somewhat self-contradictory. After having at considerable length and with great vigor, clearness and learning expounded the doctrine that the civil courts will not review the proceedings of church tribunals, nor concern themselves with the discipline, modes of procedure or jurisdiction of such bodies, or attempt to decide upon the spiritual or ecclesiastical *status* of members, or alleged members, of religious societies, the opinion denied intervention to a local incorporation, or its legal representatives, being, seemingly, the only body having, under the laws of the state, the title or right of possession of the property in dispute, and proceeded to dispose of the case with sole reference to the ecclesiastical *status* of the defendant. According to our view, and to the nearly unanimous voice of the authorities, the persons denied intervention were not only proper and necessary, but the only indispensable parties plaintiff to the action.

The opinion does indeed say that the property had, in that instance, been conveyed to the bishop, who was plaintiff, but the remark seems to have been casually made, and is not stated to have been founded upon the pleadings or evidence, and the fact was, apparently, regarded as of no importance or significance in the case.

It is assumed in the briefs and argument on both sides, and perhaps also in a vague way and extremely qualified sense, in the pleadings, that the title to the Seward and Ulysses property is in the Roman Catholic church. To our minds this is an inconceivable assumption. That church is not, in contemplation of the laws of this state, a corporation, or a partnership, or a legal entity of any sort, and does not claim so to be. It is a hierarchy composed of a series of clerical dignitaries of various ranks and degrees, scattered over the whole world, and deriving their power and importance from the papal court at Rome, to whom they owe allegiance, and from whom they are liable at any time to suffer degradation. That court claims to be an independent sovereign power, a political as well as an ecclesiastical state having universal dominion, superior to all other principalities and powers of whatever description and wherever situated. As such it can acquire territorial rights in Nebraska, if at all, only with the consent of its legislature, by treaty with the government at Washington. The parties evidently regard the title to the property in dispute to be in the church, in the sense that it is subject to church jurisdiction and government, in much the same way as the ultimate title and eminent domain of all property within the territorial boundaries of the commonwealth are said to be in the state. The pleadings of both parties in this case proceed upon the assumption that the church tribunals, both local and foreign, have a jurisdiction of their own over church property, or property devoted to church uses, and over members of the catholic priesthood, concurrent with, but superior to, that of the courts of the state, and that the whole duty of the latter, with respect to such matters, is to lend their aid for

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the carrying into execution the judgments and sentences of the former. In former days, and in the mother country, such a pretense would have incurred the penalties of *præmunire*, and the application for the injunction, instead of having been granted, would have been visited with swift and severe punishment for contempt of the court to whom it should have been presented. In these days, such measures are not necessary or desirable, but the civil courts ought, nevertheless, jealously to guard their own dignity and prerogatives, lest precedent followed by precedent shall gradually encroach upon the domain of the civil law and revive the abuses of a bygone age.

It is recommended that the former decision of this court and the judgment of the district court be wholly reversed, vacated and set aside, and the cause remanded with directions that the action, both upon the petition and upon the cross-petition, be dismissed, each party to pay his own costs, but without prejudice to the future litigation of the rights of either party, if either has any, under the laws of this state, to the property in dispute.

LETTON and OLDHAM, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, it is ordered that the former decision of this court and the judgment of the district court be wholly reversed, vacated and set aside, and the cause remanded, with directions that the action, both upon the petition and upon the cross-petition, be dismissed, each party to pay his own costs, but without prejudice to the future litigation of the rights of either party, if either has any, under the laws of this state, to the property in dispute.

JUDGMENT ACCORDINGLY.

JOSEPH COULSON, APPELLEE, V. HANNAH SALTSMAN ET AL.,  
APPELLANTS.

FILED MARCH 17, 1904. No. 12,899.

1. **Attachment Lien: CREDITORS' SUIT.** The lien acquired by attachment or garnishment is not lost by taking a general money judgment against the defendant without an order for the sale of the attached property, where the creditor has used due diligence in the prosecution of a creditor's bill.
2. ———: ———: **EXECUTION.** A creditor by the levy of attachment upon land acquires a specific lien sufficient to support a suit in the nature of a creditor's bill to remove obstructions from the title calculated to make a sale unprofitable, and in such case the issuance of an execution and return *nulla bona* is not a preliminary prerequisite.
3. ———: ———: **DORMANT JUDGMENT.** Where a creditor has acquired a specific lien by the levy of an attachment, he is entitled to maintain a creditor's bill to remove obstructions to a sale of the premises, without reference to whether the judgment at law has, during the pendency of such creditor's suit, become dormant.
4. **Action Against Heirs: PARTIES.** Under the decedent law of this state, a nonresident who claims a life interest in lands located in this state, by virtue of a will which has never been probated in the courts of this state, is not a necessary party to a suit against the heirs at law of the decedent to subject the land to payment of the claims of creditors.
5. **Evidence.** Evidence examined, and found sufficient to sustain the finding and decree of the trial court.

APPEAL from the district court for Lancaster county:  
LINCOLN FROST, JUDGE. *Affirmed.*

*H. H. Wilson and Ricketts & Ricketts*, for appellants.

*E. F. Pettis*, *contra*.

KIRKPATRICK, C.

This is a suit in the nature of a creditor's bill by Joseph Coulson, appellee, against Hanna Saltsman and others, appellants. It appears that on March 19, 1879, John Clark, Sr., who at that time and ever since has resided in

the state of Ohio, gave his note to appellee for \$225 due January 21, 1880, with interest at 8 per cent. Some time about September 19, 1885, Clark became the owner of the land in controversy, being 80 acres situated in Lancaster county. On October 1, 1893, an action was commenced in the district court for Lancaster county by appellee upon the note. Appellee filed the necessary affidavit and procured the issuance of an order of attachment, which was levied upon the land in controversy on October 12, 1893. Such proceedings were had in the action that on March 12, 1895, appellee recovered a judgment against John Clark, Sr., for \$486 and costs. On November 12, 1899, John Clark, Sr., executed a deed conveying the land to his wife, Martha J. Clark, which was recorded November 18, 1899. On July 12, 1886, John Clark, Sr., executed and delivered to his son, Sherman Clark, one of the appellees herein, a mortgage upon the above mentioned land in the sum of \$1,000. Subsequently a second mortgage seems to have been executed to appellee, Sherman Clark, in the sum of \$2,200. On August 5, 1895, Martha J. Clark, at that time the record owner of the land, died, leaving 9 children as her heirs at law, who are appellees herein. On January 29, 1896, appellee Coulson began this suit, pleading in his petition the execution and delivery of the note hereinbefore mentioned; the issuance and levy of the order of attachment upon the premises; the recovery of the judgment in said proceedings; that the sum due was wholly unsatisfied; that John Clark, Sr., was wholly insolvent; that the conveyance made by John Clark, Sr., to his wife, Martha J. Clark, was without consideration, and made with intent to defraud creditors; that the mortgages of John Clark, Sr., to his son Sherman Clark, were without consideration, and made with intent to defraud plaintiff and other creditors; that the deed to Martha J. Clark and the mortgages to Sherman Clark were clouds upon the title to the premises attached; that the premises were reasonably worth the sum of \$2,000, but that they could not be sold because of the clouds cast thereon by the

deed and mortgages mentioned, and that plaintiff had only recently discovered that John Clark, Sr., was the owner thereof. The petition concluded with a prayer that the deed and mortgages be decreed fraudulent; be set aside and held for naught, and for the sale of the premises for the satisfaction of the judgment. Subsequently an amended petition was filed by appellee which set out the same matters, and, in addition, pleaded that an order had been made by the trial court for the sale of the premises under the attachment. To the amended petition, Sherman Clark filed a separate answer, alleging that the deed from his father to his mother was made in good faith, for a valuable consideration, and without any intent to defraud, hinder or delay creditors; that the mortgages executed to himself were for a valuable consideration, were made in good faith, and without intent to defraud, hinder or delay creditors, and denying generally all the other allegations of the petition. The remaining appellees joined in an answer admitting that they and Sherman Clark were the sole heirs of Martha J. Clark, deceased; that they were the owners in fee of the land in controversy; that the conveyance from John Clark, Sr., to their mother was made in good faith and for a valuable consideration, and without intent to defraud; and denying generally. To these answers was filed for reply a denial of new matter, and an allegation that the levy of plaintiff's attachment was long prior to the execution of the mortgages from Clark, Sr., to his son Sherman. The trial resulted in a finding and judgment canceling the deed and mortgage and directing the sale of the premises as prayed by appellee.

Appellants herein allege error in the judgment of the trial court: (1) That appellee had taken personal judgment against Clark, Sr., in the action upon the note, and had not obtained an order for the sale of the attached property, thereby waiving his attachment lien upon the premises; (2) that no execution had been issued and returned *nulla bona* upon the judgment, and therefore appellee, not having exhausted his remedy at law, could not

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have the aid of this proceeding; (3) that appellee's judgment, at the time of the trial of this cause, had become dormant, and was not a lien upon the premises, and therefore he could not recover in this case; (4) that there was a defect of parties in the action for the reason that Martha J. Clark, who died testate, provided in her will that John Clark, Sr., should have a life estate in the premises, and that he should have been made a party to the creditors' suit. The questions presented will be considered in the order named.

It is first contended that appellee, having in his suit at law taken a personal judgment without procuring an order for the sale of the attached property, waived his lien. We are unable to discover any merit in this contention. Cases are cited from the supreme court of the state of Indiana which seem to sustain the view contended for by appellants, but an examination of the statutes of that state discloses provisions that differ in essential particulars from our own and prevent the cases cited from being authority in the case at bar. Appellee having acquired a specific lien upon the property by the levy of his attachment could only lose his lien by an order discharging his attachment. *Herman Bros. v. Hayes & Jones*, 58 Neb. 54. In the case at bar it will not be contended that appellee could have proceeded to sell without the aid of a court of equity to remove the cloud on the title created by the fraudulent conveyances, even if he had procured an order for the sale of the attached property, and the law will not require him to do a foolish or unnecessary thing. Appellee made seasonable application to a court of equity for relief, and this is all he could be required to do; and it would not be in accord with the principles of equity to hold that by failure to procure an order for the sale of the attached property, which would have been unavailing, he lost his lien.

The statute of Illinois is very similar to that of our own state in the matter of attachment, and in *Yarnell v. Brown*, 170 Ill. 362, the supreme court of that state said:



"The appearance of Wooley was entered in the attachment suit and a general judgment was rendered against him, and it is argued on behalf of appellee that the attachment was thereby abandoned and the lien of the attachment released, so that the lien of the judgment became a general one. We do not think that such is the effect of the judgment. It is true that execution might issue thereon, not only against the property attached but the other property of Wooley, and yet the lien as to the particular tract of land levied upon was preserved, and appellant was not put in a worse position by the appearance and general judgment than she would have been if Wooley had not appeared."

We are convinced of the soundness of the view expressed in the language quoted. The same view has been expressed by other courts. *Waynant v. Dodson*, 12 Ia. 22. It follows that the first contention of appellants can not be sustained.

The second and third contentions may conveniently be considered together. It is said that no execution having been issued upon the judgment at law at the time of the trial of this suit in the district court, and more than 5 years having elapsed after the entry of the judgment, the judgment was barred, and could not be made the basis of an equitable proceeding such as this. This point is not well taken. As we have seen, appellee, by the levy of his attachment upon the land, had acquired a specific lien, which was sufficient to entitle him to invoke the aid of a court of equity to remove an obstruction that might exist preventing the sale upon execution. This court has repeatedly held that in such cases the issuance of an execution and its return *nulla bona* are unnecessary. *Kennard, Daniel & Co. v. Hollenbeck*, 17 Neb. 362; *Merchants Nat. Bank v. McDonald*, 63 Neb. 363.

Again, it is urged that the judgment having become dormant, appellee had lost his lien upon the premises, and therefore at the time of the trial the evidence did not show that appellee was entitled to a decree. This position,

like the other, can not be sustained. Appellee having recovered a judgment in his action at law, in which the land had been attached, was entitled to a sale of the premises for the satisfaction of his judgment. As we have seen, by the levy of the attachment a specific lien was acquired upon the property, for the satisfaction of which he was entitled to a sale of the premises. It was disclosed that this sale could not be made until by the aid of a court of equity, certain fraudulent conveyances were vacated. A decree having been entered by the trial court in this proceeding vacating those conveyances, the right of appellee to the satisfaction of his judgment, in our opinion, did not at all depend upon whether the lien established had become dormant as a judgment lien or not. He was clearly entitled under the decree in this case to enforce his specific lien. *First Nat. Bank v. Gibson*, 60 Neb. 767. It is finally contended that John Clark, Sr., was a necessary party to a correct determination of this suit, and that, because of the failure to join him as a defendant, there is a defect of parties, which renders the judgment erroneous. We are unable to discover merit in this contention. It is disclosed by the record that appellants claimed title, not only by descent from the mother but by will duly executed by the mother. It is disclosed that the will mentioned contains a provision demising to John Clark, Sr., a life estate in the land in controversy. It is claimed that this will was duly probated in the courts of Ohio, but it is not contended that the will had ever been presented for probate or probated in the courts of this state. All of the appellants, as well as John Clark, Sr., are non-residents of this state, and under our decedent law it would appear that appellants, who are the children of Mrs. Clark, would, if the mother was the owner of the premises, acquire the title in fee simple on the death of the mother; and that John Clark, Sr., not having a homestead interest in the land, and not having resided in this state, would have no interest therein. It follows that he was not a necessary party to this proceeding. *Barney v. Bal-*

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Zeigler v. Sonner.

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*timore City*, 73 U. S. 280; *Potter v. Phillips*, 44 Ia. 353; *Coffey v. Norwood*, 81 Ala. 512.

It is suggested in the reply briefs of appellants filed herein that the decree of the trial court is not sustained by sufficient competent evidence. We have carefully examined the evidence and are of opinion that no other judgment could have been entered by the trial court than that entered. The evidence establishes beyond question that the conveyances, that by deed and those by mortgage, were without consideration and in fraud of creditors.

It is therefore recommended that the judgment of the trial court be affirmed.

HASTINGS, C., concurs.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is

AFFIRMED.

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SAMUEL ZEIGLER ET AL. V. M. G. SONNER ET AL.

FILED MARCH 17, 1904. No. 13,311.

1. **Jurisdiction: AFFIDAVITS: BILL OF EXCEPTIONS.** The affidavits upon which a justice of the peace decides an objection to his jurisdiction over the person of the defendant can not, on error to the district court, be reviewed, unless incorporated in a bill of exceptions duly settled, signed and allowed by the justice, in conformity with the provisions of section 311 of the code, as amended by chapter 72, laws 1895.
2. **Review: AFFIRMANCE.** Upon error from a judgment of a justice of the peace to the district court, if error does not affirmatively appear in the proceedings had before the justice, the judgment of the justice should be affirmed.

ERROR to the district court for Dodge county: JAMES A. GRIMISON, JUDGE. *Judgment of district court reversed. Judgment of justice court affirmed.*

C. E. Abbott, for plaintiffs in error.

McNish & Graham and J. H. Brown, contra.

**KIRKPATRICK, C.**

This action was commenced by Samuel Zeigler and George Zeigler, partners doing business as the Forest City Nursery Company, in a justice court of the county of Dodge, against M. G. Sonner and William L. E. Green, asking judgment in the sum of \$180 for damages for the breach of a contract for the purchase of nursery stock. Service was had upon Green in Dodge county, and an alias summons issued to the sheriff of Wayne county, who made return that he had served the writ upon Sonner in that county. Sonner appeared and objected specially to the jurisdiction of the justice over his person on the ground that Green was only a nominal defendant, having no real interest adverse to that of plaintiffs. He supported his objection by an affidavit setting up that Green was the agent of plaintiffs in the sale of their stock, that Green had procured Sonner to enter into the alleged contract for the purchase of the nursery stock, and that he was interested in the contract to the extent of his agent's commission, and that if Green was a signer upon the contract sued on as surety, he was made such without the knowledge or consent of affiant. Counter affidavits by plaintiffs and Green were made denying these alleged facts. Upon the issue thus joined the justice found that Green was a *bona fide* defendant, and that, accordingly, he had jurisdiction over the person of defendant Sonner.

Thereupon Sonner filed an answer, pleading the facts already set out in his affidavit, alleging that he did not waive the question of the jurisdiction of the justice over his person, denying generally all the allegations in plaintiffs' petition, alleging that the contract sued on was without consideration, and denied that he executed the contract sued on for nursery stock in the sum of \$180, and that if plaintiff held such contract, it had been forged or altered by persons unknown to him. Plaintiffs filed a reply denying generally.

It appears that the trial was had on the date of filing

the answer and reply, the justice docket reciting that Sonner elected not to appear further. After hearing testimony, the justice entered judgment against Sonner as principal and Green as surety in the sum prayed for.

After the entry of this judgment, Sonner prosecuted error to the district court, alleging first, that the justice erred in overruling Sonner's special appearance; second, that the justice erred in assuming jurisdiction of the person of Sonner; third, that he erred in taking the cause under advisement from the 7th day of May until the 20th day of May, 1902; and fourth, that the justice erred in rendering judgment for plaintiffs and against Sonner. Upon a hearing in the district court the judgment of the justice was reversed, costs of error proceedings were taxed against plaintiffs, defendants in error therein, and the cause retained for trial and final judgment in the district court. From this judgment this proceeding in error is prosecuted by the Zeiglers, who complain of this judgment of reversal, contending that the judgment of the district court should have been one of affirmance.

It is not very clear upon what ground the district court reversed the judgment of the justice of the peace, but it is quite likely that it was because the court believed the special appearance of Sonner should have been sustained, as it is clear that there was no other ground upon which error could have been predicated. It is obvious that the district court could not pass upon the question of fact raised by the special appearance of Sonner, as that question was decided by the justice upon affidavits which had not been incorporated in a bill of exceptions and taken to the district court. Prior to 1895, bills of exceptions from the justice court to the district court in cases not tried to a jury were not provided for in the code. This omission in the statute was recognized by this court. *Moline, Milburn & Stoddard Co. v. Curtis*, 38 Neb. 520; *Meyer & Brothers v. Hibler*, 52 Neb. 823. By amendment to section 311 of the code, laws of 1895, chapter 72, the following provision was added to that section:

"That any person or officer, or the presiding officer of any board or tribunal before whom any proceeding may be had, shall, on request of any party thereto, settle, sign, and allow a bill of exceptions of all the evidence offered or given on the hearing of such proceeding."

There can be no doubt that the intent of the legislature in the enactment of the amendment just quoted was to supply a deficiency in the statute, and to provide for the preservation by bills of exceptions of the evidence heard by tribunals inferior to the district court in all cases whether tried before a jury or not. This court is equally powerless to review the evidence upon which the justice determined that he had jurisdiction of the person of the defendant Sonner, and it must now be assumed that that question was correctly determined by the justice in the first instance.

After the filing of his answer, it appears from the transcript of the docket of the justice that Sonner elected not to appear further, and a hearing was had, evidence aduced, and a judgment rendered in favor of plaintiffs. It can not be said that in this there is affirmative error warranting a judgment of reversal.

From the transcript it further appears that there was a hearing on the special appearance entered by Sonner May 7, 1902, and "by consent of parties case continued to May 20, 1902, 9 o'clock A. M." On May 20 Sonner's objections were overruled, and on the same day Sonner filed his answer and plaintiffs their reply, and judgment was entered. We mention this only in connection with the assignment in error to the district court, which, however, is not urged in briefs, "that the justice erred in taking the case under advisement on May 7, and not rendering judgment thereon within 4 days thereafter." It is manifest that this assignment under the record was not sustained.

Our examination of the record has failed to reveal, and counsel do not point out, error in the proceedings had before the justice. It follows that the judgment of reversal entered by the district court is erroneous; and it is there-

fore recommended that the same be reversed and the judgment of the justice affirmed.

DUFFIE and LETTON, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of reversal of the district court is reversed, and the judgment of the justice is affirmed.

• JUDGMENT ACCORDINGLY.

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JOHN MCCORMICK V. STATE OF NEBRASKA.

FILED APRIL 7, 1904. No. 13,346.

1. **Criminal Law: ERRONEOUS SENTENCE: DUTY OF APPELLATE COURT.** Where a prisoner has been found guilty on a criminal charge, and the only error that appears on the record is the failure of the court to pronounce a legal judgment against him, it is the proper practice, and this court has the power, after setting aside the void or erroneous judgment, to remand the case and the accused, if sentence has not been suspended, to the district court, with instructions to render judgment on the verdict in the manner provided by law.
2. **Erroneous Sentence: CONSTITUTIONAL LAW.** Confinement in the penitentiary under a void or erroneous sentence, because of the failure of the accused to obtain a suspension of his sentence during the pendency of his proceedings in error, is in no sense a part execution of a legal sentence; and by the rendition and execution of a legal judgment, the accused is not twice punished for the same offense.
3. ———: **POWERS OF COURTS.** An ineffectual attempt of the district court to render a judgment on a verdict according to the provisions of the law, does not deprive that court of the power to pronounce a valid judgment against the accused.

ERROR to the district court for Otoe county: PAUL JESSEN, JUDGE. *Affirmed.*

*Charles O. Whedon, John C. Watson and Robert Ryan,*  
for plaintiff in error.

*Frank N. Prout, Attorney General, and Norris Brown,*  
*contra.*

**BARNES, J.**

In March, 1902, John McCormick, the plaintiff in error, was duly tried and convicted of the crime of murder in the second degree, in the district court for Otoe county. He was sentenced to serve a term of 20 years in the state penitentiary, and from that judgment he prosecuted error to this court. A hearing here resulted in a judgment affirming his conviction, and it was found that there was no error in the record up to and including the verdict. It was disclosed, however, that the trial judge had failed to inform him of the verdict of the jury, and to ask him if he had anything to say why judgment should not be pronounced against him; for that reason the judgment was held to be invalid, and was reversed. *McCormick v. State*, 66 Neb. 337. Thereupon, a mandate was issued directing the trial court to render a valid sentence and judgment on the verdict. It appears that during the pendency of the proceedings in error the plaintiff, having been unable to furnish bail and obtain a suspension of the sentence complained of, was confined in the state penitentiary. On the 4th day of February, 1903, he was again brought into the district court for Otoe county, and was informed by the court of the verdict of the jury, and asked if he had anything to say why judgment should not be pronounced against him. He thereupon objected to the jurisdiction of the court to pass sentence upon him, and contended that by so doing the court would violate his constitutional rights. His objections were overruled, and no other reason having been shown why the court should not render judgment on the verdict, he was sentenced to confinement in the state penitentiary for 19 years. This is a proceeding in error to reverse said judgment.

The plaintiff contends that the judgment herein complained of calls for the infliction of a second punishment for the same offense, and cites in support of his contention, *Ex parte Lange*, 18 Wall. (U. S.) 163. In that case the accused was tried in the circuit court of the United States



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for the southern district of New York, for the crime of stealing mail bags of less value than \$25. The punishment provided by law for that offense was imprisonment for not more than one year, or a fine of not less than \$10, nor more than \$200. He was found guilty, and was sentenced by the court to one year's imprisonment *and* to pay a fine of \$200. He was thereupon committed to jail, and on the following day paid his fine, which was in turn paid into the treasury of the United States. Thereupon the prisoner was brought before the court on a writ of habeas corpus, the same judge presiding, and an order was entered vacating the former judgment, and he was again sentenced to one year's imprisonment from that date. Thereafter he was brought before the supreme court of the United States on a writ of habeas corpus, and the return of the marshal showed the foregoing facts. In granting him his discharge, the court held that the first sentence and judgment was valid in so far as it imposed the fine of \$200, but that the accused could not be punished by both fine and imprisonment; that having accepted as valid that portion of the first sentence, which imposed the fine, and having paid, and the government having accepted such payment and turned it into the treasury, from whence it could not be withdrawn, that the second judgment by which the accused was sentenced to imprisonment for one year, if carried out, would amount to his being twice punished for the same offense. Plaintiff also cites *Brown v. Rice*, 57 Me. 55. In that case the prisoner was legally sentenced, and duly committed to imprisonment in the county jail. Several days afterwards he was recalled into court and sentenced on the same indictment and conviction to be imprisoned in the state penitentiary for the term of 3 years. On these facts the court said:

"In this case the warrant had issued, had been executed, the prisoner had been under sentence, and in prison, under the warrant, and had suffered 19 days of confinement. This was a legal sentence, and was in the process of execution, when, for some reason, doubtlessly one that the

judge deemed sufficient, he was brought from the jail, and the former sentence was recalled and revoked and the new one imposed."

The second sentence was illegal because the first one having been a legal sentence, and having been at least partly executed, the trial court had no power to recall the prisoner, set aside its former judgment and resentence him to a term in the state penitentiary.

We have carefully examined each of the other cases cited by the plaintiff in support of his position. Comment upon them singly is neither profitable nor necessary, and can not be indulged in for want of time and space, but we may say that in each and all of them the first sentence imposed by the court was either legal in whole or in part, and hence it was held that the court had no power to set aside the sentence which had been partly or completely executed, and pronounce another and different one. We are in full accord with the doctrine laid down in these cases. But it will be observed that in the case at bar we held that the first sentence imposed upon the plaintiff was void, for the reason that the court in pronouncing it had not proceeded in the manner provided by statute. In this case the trial court did not set aside a former legal sentence and judgment, but this court set aside the sentence because it was null and void. Upon remanding the case to the district court, it stood there on the verdict of conviction, and upon which the trial court was required by law, and the order of this court, to pronounce a valid sentence and judgment. The difference between the cases cited by the plaintiff in support of his contention and the one at bar is a radical one. If the sentence and judgment of the trial court in the first instance had been legal in whole or in part, and if any portion of the same had been executed, it would seem that the plaintiff should be discharged. But such is not the case. The plaintiff prosecuted error because, as he claimed, the sentence and judgment was illegal and void, and his contention was sustained. He was therefore granted the right to have a

valid and legal sentence pronounced against him. This was one of the things that he contended for, and his confinement in the penitentiary, for want of a suspension of this void sentence during the pendency of his error proceedings, was no part of the execution of a valid sentence, and the judgment complained of does not amount to a second punishment for the same offense.

It is further contended that the order of this court directing the entry of a valid judgment on the verdict, and the sentence pronounced thereunder, was without warrant, and thereby the plaintiff was denied justice according to due process of law. To support this contention it is claimed that our criminal code contains no provisions defining or regulating the procedure in a case like the one at bar, and for that reason this court had no power to direct the district court for Otoe county to pronounce the sentence and judgment complained of. This is not a new question; and the procedure complained of has been many times upheld and sanctioned by this court. The question first arose in the case of *Dodge v. The People*, 4 Neb. 220. The plaintiff in error therein was indicted at the March term, A. D. 1875, of the district court for Otoe county, for the murder of one James McGuire. Upon the trial a verdict of guilty was returned by the jury, and he was sentenced to be executed on the 14th day of January, 1876. A writ of error was allowed to this court, and execution of the sentence was suspended until its determination. It appeared that there was no error in the record up to and including the return of the verdict of guilty against the accused. It also appeared that the court had failed to inform the accused of the verdict of the jury, and ask him whether he had anything to say why judgment should not be pronounced against him, and it was insisted that for that reason the sentence and judgment of the court was void; that this court had no authority to either pass sentence or remand the cause to the district court, with instructions to pronounce sentence in conformity with law, and that therefore the prisoner must

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be discharged. The court in answer to this contention made use of the following language:

"We are aware that cases can be found holding, under a statute similar to ours, that there is no authority in this court either to resentence the prisoner, or remand the case to the court below for that purpose. We may correct errors in any other respect, review the proceedings of the district court, see that the accused has had a fair trial, and that his rights have been properly guarded and secured, but the moment it appears that the court has not fully complied with the law in pronouncing sentence, it is at once ousted of jurisdiction, and the accused must go acquit. This doctrine, originating in England at a time when the courts of that country held that they had no authority to revise proceedings and judgments in cases of felony, and grant new trials, partakes of the reasoning of that period, that the judgment in a criminal case was absolute, unless a pardon was granted, that if the judgment did not conform to the law there was no power of revision or amendment, and as the prisoner could not be held on an invalid judgment he must therefore be discharged. This doctrine was expressly overruled in *King v. Kenworthy*, 1 Barn. & Cr. (Eng.) \*711; and in *Regina v. Holloway*, 5 Eng. Law & Eq. 310, and the English courts now hold that they have full authority in such cases to impose the sentence required by law. In the case of *Beale v. Commonwealth*, 25 Pa. St. 11, 22, the court held: 'The common law embodies in itself sufficient reason and common sense to reject the monstrous doctrine, that a prisoner whose guilt is established by a regular verdict is to escape punishment altogether, because the court committed an error in passing the sentence. If this court sanctioned such a rule, it would fail to perform the chief duty for which it was established. Our duty is to correct errors, and to "minister justice;" but such a course would perpetuate error, and produce the most intolerable injustice.' And so it was held that the judgment should be reversed and the cause remanded to the district court, with instruc-

tions to pronounce judgment on the verdict in the manner prescribed by statute. This decision has been followed and affirmed in *Tracey v. State*, 46 Neb. 361; *Griffen v. State*, 46 Neb. 282; *Barker v. State*, 54 Neb. 53, 58, and in our former judgment in this case reported in 66 Neb. 337. The foregoing decisions are based on, and follow the rule announced in, the cases cited in the quotation from *Dodge v. The People*, *supra*, together with *Benedict v. State*, 12 Wis. 313; *Williams v. State*, 18 Ohio St. 46; *Pickett v. State*, 22 Ohio St. 405. We are satisfied with the reasoning of these cases, and have no disposition to set aside so salutary a rule of law, and this rule should no longer be the subject of discussion in this jurisdiction.

Again, if this were a new question, there appears to be no substantial reason why we should not adopt the present rule. Ours is not a court of general original jurisdiction, but in most matters is only a court of review, and yet it must be conceded that when we have passed on a matter brought before us, for that purpose, we have the inherent power to make such orders and such disposition of the case as will render our judgment effective and the mere fact that the legislature has not seen fit to point out by statute each successive step proper and necessary for us to take does not render us powerless to "minister justice." In the absence of express statutory enactment, reason and authority accord to the courts the inherent power to make such orders and adopt such methods of procedure, not inconsistent with law, as will enable them to properly exercise their jurisdictional powers, and render their judgments and decrees effective. So it was the proper procedure, when it was found that no error was committed by the district court until after the verdict, to remand the cause back to the court, which has express power to render judgment, with directions to perform that duty by pronouncing a valid judgment on the verdict. Indeed the law expressly provides that in criminal cases, where a verdict of guilty has been rendered by a jury, the district court "shall proceed to pronounce judgment as provided by

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law." When the former sentence was set aside by this court, and the cause was remanded, the matter then stood before the district court precisely as though no judgment or sentence had ever been pronounced. It was then the duty of that court, irrespective of any order of ours, to pronounce a legal judgment on the verdict. The district court is one of general and original jurisdiction. It had the power to try the plaintiff on the charge preferred against him, and pass such sentence upon him, on the verdict of guilty, as was provided by law; and we are not prepared to hold that by its abortive attempt to render a judgment against the plaintiff, its power to pronounce a legal judgment was lost. It seems clear that the power of the court could only be lost or exhausted by pronouncing a valid judgment. For these reasons we are fully satisfied with our former decisions on this question, and therefore adhere to them.

Plaintiff also insists that notwithstanding the former judgment and sentence of the district court were erroneous and void, yet he had served a portion of his time thereunder; or, in other words, the sentence had been partly executed, and therefore he is entitled to his discharge. To this we can not give our assent. It is true that the plaintiff, during the pendency of his first proceeding in error, was confined in the penitentiary, but section 518 of the criminal code provides that "Every person sentenced to the penitentiary shall, within thirty days and as early as practicable after his sentence, unless the execution thereof be suspended, be conveyed to the penitentiary of this state, by the sheriff of the county in which the conviction took place, and shall there be delivered into the custody of the warden of said penitentiary, together with a copy of the sentence of the court ordering such imprisonment." The failure of the plaintiff to procure a suspension of the erroneous sentence rendered it necessary to confine him in the penitentiary of the state during the pendency of his proceedings in error. And, as before stated, such confinement was no part of the execution of a legal sentence. If

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he had obtained a suspension of the sentence, this question would not have arisen, and it would be absurd for us to hold that, by failing or neglecting to obtain such suspension, he could render the courts powerless to punish him for his offense. There can be no doubt but that this court had the implied or inherent power to order the plaintiff to be conveyed from the penitentiary to the district court for Otoe county, for the purpose of enabling that court to pronounce judgment against him on the verdict, as provided by law. To hold otherwise would deprive the courts of this state of the power to punish persons duly convicted of crime, and they would thus not only fail to "minister justice," but would become convenient instruments for the perpetration of injustice.

For the foregoing reasons, we hold that the judgment of the district court was valid, and it is therefore

AFFIRMED.

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EDWARD F. PETTIS V. GREEN RIVER ASPHALT COMPANY.\*

FILED APRIL 7, 1904. No. 13,215.

1. **Contract:** INSTRUCTION: ERROR. Where plaintiff's claim is for services under an alleged contract of a certain date, and the evidence tends to show an offer to engage services at a fixed price at that time on defendant's part, and immediately afterwards a beginning of such services on plaintiff's part, with defendant's knowledge and with no retraction of the proposition, it is error to instruct the jury, in substance, that there can be no recovery unless an express agreement on both sides was reached at the time alleged.
2. **Evidence:** CONVERSATIONS. Section 339 of the code only requires that the entire conversation on "the same subject" may be inquired into, or one necessary to make the other fully understood. If the conversation relates to different subjects, introducing one of them in proof does not entitle the other party to inquire as to the entire conversation on other subjects, except so far as is necessary to make the part already in fully understood.

ERROR to the district court for Lancaster county: LINCOLN FROST, JUDGE. *Reversed.*

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\* Motion to retax costs denied. See opinion, p. 519, *post*.

*Edward F. Pettis and Field & Andrews*, for plaintiff in error.

*J. W. Devcese and Frank E. Bishop*, contra.

HASTINGS, C.

Plaintiff filed petition in the district court for Lancaster county, alleging that the defendant is a corporation of the state of Missouri; that about June 1, 1902, defendant employed plaintiff to perform services in and about the conducting of business as paving contractors in the city of Lincoln, and agreed to pay for such services so contracted for 10 cents a square yard, amounting to \$1,876; that plaintiff fully performed all of the services as by said contract he agreed to perform, and thereby defendant became indebted to him in the sum of \$1,876, none of which has been paid. The defendant answered, saying that, still relying upon its objection to the jurisdiction for lack of legal service of summons, it admitted its incorporation in the state of Missouri, and denied plaintiff's other allegations. A reply was filed asserting jurisdiction, and that such jurisdiction had been found by the trial court, and that its conclusion on that subject was final. Trial was had to a jury, and a verdict returned for the defendant. The plaintiff brings error, and complains of the fifth instruction given by the court, which is as follows:

"The jury are instructed that, in order to establish the contract sued on, it is necessary for the plaintiff to show that the minds of the plaintiff and defendant, through its vice-president, Mr. R. W. Speir, met, and that the contracting parties mutually agreed to the terms of the contract substantially as set out in plaintiff's petition. The fact, if you find such to be true, that plaintiff performed services for the defendant under some other contract, expressed or implied, with the defendant, would not be sufficient to establish plaintiff's allegations in this case, nor should the proposition of compromise or settlement shown in evidence



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be considered by you in determining what is due the plaintiff on the contract sued on, in the event that you find from the evidence and under these instructions that anything is due him."

It is urged that this instruction unduly narrowed the issues in the case and the application of the evidence. Of course, under the pleadings it was necessary for the plaintiff to establish his contract. This instruction told the jury that it was necessary for the establishment of that contract to prove that the minds of the plaintiff and defendant, through its vice-president, met, and that they mutually agreed to the terms of the contract substantially as set out in plaintiff's petition. The jury were also told that the fact that plaintiff performed services under some other contract, expressed or implied, would not be sufficient to establish plaintiff's allegations in this case. The two clauses taken together could have been interpreted to mean nothing else than that the only way by which plaintiff could establish his alleged contract with defendant, was by showing an express agreement on each side between the plaintiff and defendant's vice-president, on the one part, to perform these services and, on the other, to pay for them the stipulated price. Of course, if this was all the case which the plaintiff was tendering evidence to establish, the instruction would be correct. It is ordinarily necessary in order to establish a contract that the minds of the parties meet. It is so in this case. There must have been an intention on the part of each of them to contract; but it is not necessary that they mutually agreed, at the only interview which ever took place between plaintiff and defendant's vice-president, to the "terms of the contract substantially as set out in plaintiff's petition." It would be entirely sufficient to establish the contract set out in plaintiff's petition, that a proposition to procure certain services from the plaintiff at the alleged rate, was made to the plaintiff by defendant's vice-president at the interview, which took place in Sioux City, and that on his return

home and his investigating the circumstances, the plaintiff engaged in the performance of the services and, with the defendant's knowledge and without any withdrawal of the proposition, performed them. While it is necessary that the minds of the parties meet, it is not necessary that they meet at any specific time or place, and if by words or action, or by both, the plaintiff, within a reasonable time and before it was withdrawn, accepted a distinct proposition made at the date alleged in Sioux City, and performed the several things contemplated in that proposition, he would be entitled to claim the contract as of the date of the proposition. Plaintiff claims that such is the real state of affairs, which his evidence tends to establish, and that, consequently, the instruction confining him strictly to proof of mutual agreements entered into at the time of his interview with defendant's vice-president in Sioux City, was erroneous and prejudicial.

An examination of the evidence, as well as the discussion of it in the briefs of the parties, seems to show that, while there is really no claim that any agreement was reached in Sioux City, there is evidence tending to establish a proposition there made for such contract, and plaintiff's subsequent acceptance by going ahead, with the defendant's full knowledge and under frequent communication between the parties, to perform services, which are claimed to have been such as the offer contemplated, and to have been so accepted by the defendant. To be sure, the making of the proposition even is denied by the defendant, and it is also denied that services of the plaintiff, some of which are admitted to have been rendered, were in their nature and value such as were contemplated in the conversation in Sioux City. But these are both questions for the jury, under the evidence as it stands in this case, and were not submitted to them.

It is urged in defense of this instruction, that it submits to the jury the only case presented by plaintiff's pleadings. There seems no question but that the instruction requires an absolute mutual agreement. The petition merely

alleges a contract. There seems no reason to cite authorities to the proposition that the contract might be established by a proposition on the one side and action upon it by the other party with the proposer's knowledge and consent. In *Emery v. Cobbey*, 27 Neb. 621, after an offer had been expressly refused by one of the parties, his subsequent acting under it, with knowledge of the other party, is held to establish a contract. There was in this case, to be sure, an effort to show services which were not referred to in definite terms in the proposition, even on plaintiff's interpretation of his talk with defendant's vice-president, and there was ground for a caution to the jury not to allow plaintiff to recover on this contract merely because he had rendered some service; but it is clear that the plaintiff was not seeking to support his case on the ground of mutual agreement to render services on his part and to be paid a certain price for them on defendant's, but was basing it rather upon what was done by both parties in pursuance to an understanding had at Sioux City, and which seems to have been, on plaintiff's showing, indefinite as to everything except price. It seems clear that the trial court, in giving this instruction 5, unduly narrowed the issues to the plaintiff's prejudice, and that error is not corrected by any other instruction given. Indeed, it could hardly be. It is expressed in too stringent terms, and would be merely contrary to, and contradictory of, an instruction which would have permitted the establishment of the contract by the subsequent acts of the parties after the proposition, if one were made at Sioux City.

The complaint of errors in the refusal of instructions seems hardly well taken. Both of the instructions refused seem to be open to the criticism that there is no restriction of the services under consideration to such as the jury should find had been contemplated in the talk at Sioux City. Of course, other and different services from those contemplated in the proposition would be immaterial for the purpose of showing an acceptance or of entitling plaintiff to compensation under it.

It seems hardly necessary to discuss the complaints as to the admission and rejection of evidence. For the most part they seem to be based upon the view which the court took of the necessity, under the pleadings, to establish an express agreement at Sioux City between the parties.

At the argument the only complaint which was dwelt upon was the alleged violation of section 339 of the code, in refusing to permit R. W. Speir to answer question 840 in the bill of exceptions, and in rejecting the tender of proof made in support of it. The question was as follows: "You may state all that was said by Mr. Pettis at that meeting, as near as you are able, beginning at the beginning, touching and concerning the matter in dispute." The witness had stated that in a conversation held by him in New York, after these alleged services, with plaintiff, the latter had stated that he knew there was no contract. Plaintiff had testified previously that the entire New York conversation was an attempt to settle. It is now claimed that there was a right to go into the whole conversation and the cross-examining question calls for it. The question, however, seems too broad. All the conversation on "the same subject," that is, the fact of whether there was a contract or not, was what plaintiff was entitled to call for; not all the conversation as to plaintiff's claim. Anything in the conversation necessary to make this statement as to the contract understood was admissible, or that related distinctly to that contract. The talk simply in regard to a settlement was not needed for this purpose, and was rightly rejected. Only so much of the conversation as related to the subject of the existence of a contract was in question. The question was much broader than that.

For the error in unduly restricting plaintiff's right of recovery to one on an express agreement on each side, made in a conference of the parties, it is recommended that the judgment of the district court be reversed and the cause remanded for further proceedings according to law.

AMES and OLDHAM, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is reversed and the cause remanded for further proceedings according to law.

REVERSED.

The following opinion on motion to retax costs was filed November 2, 1904. *Motion denied:*

**Costs:** BILL OF EXCEPTIONS. The necessary expense of settling a bill of exceptions upon the determination of a cause in the district court is taxable as costs incurred in that court to be adjudged against the unsuccessful party in the final determination of the litigation.

SEDGWICK, J.

The plaintiff in error in this case, having been successful in this court, and being entitled to recover his costs incurred in this court, insists that the expense of obtaining the transcript of the evidence in the court below for the purpose of settling a bill of exceptions is a part of the costs in this court and should be taxed as such. The appellant or plaintiff in error, upon obtaining judgment in this court reversing the decree or judgment of the lower court, is entitled to recover his costs in this court without regard to the further proceedings after the case is remanded to the district court, and notwithstanding that he may be ultimately defeated in the litigation. The costs, however, in the district court, whether before or after the appeal or proceedings in error in this court, are to abide the final result of the suit and to be taxed against the unsuccessful party. If the expense of settling the bill of exceptions is to be considered, under such circumstances, as costs in this court, this motion should be sustained; but if such expense is cost incurred in the district court, the motion must be overruled. *National Masonic Accident Ass'n v. Burr*, 57 Neb. 437.

Our code provides that a party objecting to the decision of a court must except at the time the decision is made,

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and time may be given to reduce the same to writing. Sec. 308. The exception must be stated with so much of the evidence as is necessary to explain it. Sec. 309. If the decision objected to is entered on the record, and the grounds of objection appear in the entry, the exception may be taken by the party causing to be noted, at the end of the decision, that he excepts. Sec. 310. If the decision is not entered on the record or the grounds of objection do not sufficiently appear in the entry, the party excepting must reduce his exceptions to writing within a limited time after the adjournment of the term (sec. 311), and must submit the same to the adverse party for examination. If objections are made, and the judge has determined and approved a correct statement of exceptions, it is allowed by the judge and is made a part of the record of the case. For this purpose, it is filed by the clerk and preserved by him as the other records in the case. It seems to be admitted that the bill of exceptions then becomes a record of the district court. It never becomes a permanent record of the supreme court.

The code provides that the plaintiff in error shall file with his petition in error in this court a transcript of the proceedings containing the final judgment or order sought to be reversed, vacated or modified (sec. 586), and also that the clerk of the district court shall upon request, and being paid the lawful fees therefor, furnish an authenticated transcript of the proceedings to either of the parties to the same or to any person interested in procuring such transcript. Sec. 587. This, of course, involves making a copy of the whole record, which would include the bill of exceptions as a part of the records of the district court. By section 1, chapter 28, laws 1881, it was provided that, instead of copying the bill of exceptions into this transcript, the original bill of exceptions itself shall, on the request of any party desiring to prosecute proceedings in the supreme court, be attached to the transcript or record, and be certified by the clerk of the district court to be the original bill of exceptions.

After the case is disposed of in the supreme court, the bill of exceptions is to be returned to the district court upon the request of any party interested. Code, sec. 587c. If the appellant should take a transcript of the entire record of the district court, including the bill of exceptions, instead of having the original bill of exceptions attached to his transcript, his right to have the expense of such transcript taxed as costs in this court might, perhaps, be questioned on the ground that such expense was unnecessary; but there could be no doubt of his right to proceed in such manner or of the efficacy of such transcript. It is suggested that, in practice, bills of exceptions are usually procured to be allowed with the view of taking the case to this court upon appeal or proceedings in error, and that therefore it ought to be considered that the expense of settling such bills is a necessary cost of this court. While it is true that bills are generally procured to be allowed with such purpose in view, yet it is not always the case. It sometimes happens that it is necessary that the records of the district court should be made thus complete for use in that court. This seems to be contemplated by the statute which requires them to be settled in that court and makes them a part of the record there. By the practice in some of the districts of this state, the clerk has entered the expense of the bill of exceptions as costs in the case, when the bill of exceptions is filed with him as a part of the records of his office. This appears to be the correct practice. 11 Cyc. 232d; *Pinney's Will*, 27 Minn. 280.

In *Palmer v. Palmer*, 97 Ia. 454, the court appears to take a different view. It would seem from the opinion that the practice there is quite similar to our own, and that when the bill of exceptions is settled, it is made a part of the record of the district court and, as such, filed in said court; and yet the court say: "It is to be remembered that the costs of the transcript follow the costs in this court because made upon appeal." There is no explanation of the sense in which it may be said that these costs are made upon appeal. Possibly, the view above suggested

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was taken that, since bills of exceptions are usually settled with a view of prosecuting proceedings in the supreme court, the costs of the same should be considered as costs of the reviewing court; but, as before stated, it seems to us that the rule to be derived from our statute and practice is otherwise. The view of the Minnesota court, as expressed in the case above cited, is in harmony with the provisions of our statute above quoted. We have noticed several decisions of other courts more or less directly bearing upon the question here presented, but none of them sufficiently discuss the statutes and rules of practice from which they are derived to make them available as authorities in this state. Among them may be noted the following: *Hayes v. Livingston*, 35 Mich. 371; *Roby Lumber Co. v. Gray*, 73 Mich. 356; *Novotny v. Danforth*, 9 S. D. 412; *First Nat. Bank v. North*, 6 Dak. 136; *Brown v. Winchill*, 4 Wash. 98; *Turner v. Muskegon Machine & Foundry Co.*, 97 Mich. 166.

We think that costs of settling the bill of exceptions are costs made in the district court, and should be taxed as such against the unsuccessful party in the final determination of the litigation.

MOTION OVERRULED.

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FRANK E. MOORES, MAYOR, ET AL. V. STATE OF NEBRASKA,  
EX REL. I. J. DUNN ET AL.

FILED APRIL 7, 1904. No. 13,567.

1. **Mandamus:** DISCRETION OF COURT. While the courts, in the exercise of a sound discretion, will not issue the writ of mandamus, even to vindicate a technical right, where more harm than good will result through its interference with municipal administration, such considerations are addressed to the trial court. Only in a clear case of abuse of discretion would the granting of a mandamus be reversed for such a cause.
2. ———: GAMBLING. Where a number of prosecutions have failed to bring about the closing of a public gambling house, the exist-



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ence of the remedy by complaint and arrest on warrant of the offenders will not prevent a writ of mandamus to require the mayor and chief of police of a metropolitan city to use their summary powers to prevent such open violation of law.

3. **Cities: DUTIES OF MAYOR AND CHIEF OF POLICE.** The statutes of this state require the mayor and chief of police of such city to actively interfere to prevent or stop open violations of law.
4. **Mandamus: MOTIVES OF RELATOR.** That one of two relators, asking a mandamus, admits that his leading motive in assailing a "pool room," whose closing was the object sought, was the belief that a certain citizen, who had actively assisted its operation, was interested in its profits, is no ground for reversing a judgment in favor of the relators.
5. **Evidence: POOL ROOM.** Evidence *held* to sustain the district court's conclusion that the "pool room" in question was a "room to be used or occupied for gambling within the statutes of the state of Nebraska."

ERROR to the district court for Douglas county: LEE S. ESTELLE, JUDGE. *Affirmed.*

*W. J. Connell*, for plaintiffs in error.

*Lysle I. Abbott and I. J. Dunn, contra.*

HASTINGS, C.

This is an error case brought to reverse the granting of a peremptory writ of mandamus by the Douglas county district court. The action was brought by I. J. Dunn and L. I. Abbott not only against Frank E. Moores, mayor, and John J. Donahue, chief of police in the city of Omaha, who are plaintiffs in error, but also against the members of the board of fire and police commissioners and P. J. Mostyn, acting chief of police. A demurrer on behalf of the board to the petition was sustained. The acting chief of police, Mostyn, had ceased to exercise such functions before the hearing and was dismissed. A peremptory writ was awarded against the chief of police, commanding him to forthwith arrest or cause to be arrested all persons found violating the laws of the state or the ordinances of the city relating to gambling, or operating or maintaining

a gambling room for the purpose of unlawful gaming at number 1313 Douglas street, known as "The Diamond Pool Room," and directing him to at once take action to detect all persons there engaged in such violation of the laws of the state and of the city ordinances. A peremptory writ was also awarded against the mayor, commanding him to cause this to be done by the chief of police, and to order the chief of police and, through him, the officers of the police department to detect and arrest all persons engaged in the violation of the laws of the state at the place designated. The costs of the action were taxed against the respondents, Moores and Donahue.

The mayor and chief of police filed a motion for a new trial, on the grounds that the decision was not sustained by the evidence and was contrary to law; that the findings that relator, Abbott, was acting in good faith and that there was no conspiracy between the relators were contrary to the evidence and not sustained by it; that the peremptory writ does not conform to the alternative one; that the writ requires acts in excess of respondents' duties; that upon the finding that Dunn was not acting in good faith the action should have been dismissed; that under the findings of law made by the court the action should have been dismissed, and that the judgment for costs was unlawful and unjust. From the overruling of this motion the respondents, Moores and Donahue, having filed a supersedeas bond, bring error.

The sole action which the mayor and chief of police are required by the peremptory writ to take is to proceed to use the powers and resources of the police department of the city of Omaha to suppress open violations of the statutes of Nebraska, and of the ordinances of the city of Omaha, in the matter of gambling and conducting a room for the purpose of unlawful gaming at number 1313 Douglas street in that city. The trial court thought that, under the evidence produced in this case, the mayor and chief of police should be required to do this. They say not, and they give four reasons why this court should reverse

the action of the district court and vacate the judgment: "1st. That the wrong complained of is not of so grave a character as to warrant interference by mandamus, and to so interfere would be for the court to assume the administrative functions of the municipal government. 2d. Other adequate and appropriate remedies exist. 3d. It is not the duty of the mayor or chief of police to do the things required. 4th. The action was not instituted or prosecuted by the relators in good faith."

The facts seem to be, that at number 1313 Douglas street in the city of Omaha, in the back part of a room, whose front is occupied by what is known as the "Diamond Saloon," under license for the sale of intoxicating liquors, and is used for that purpose, is openly and publicly carried on what is called a "pool room." The dates of races in different parts of the country and the names of the horses entered are posted upon a blackboard and, opposite the name of the horse, is posted the odds against his winning in that particular race; any customer, who desires to bet upon any horse, pays in his money and receives a ticket entitling him, in the event of that horse's winning, to the odds posted opposite the horse's name on the board.

The trial court found that the business of selling pools on horse races had been carried on there since some time in January, 1903, up to the trial of the action, which was finished November 30, 1903. The selling and buying of pools on horse racing was found to be betting on the same; the fixtures used in this pool room, a blackboard and a telegraph instrument, chairs, counters, drawers, books, pencils, tickets, pen, ink and sheets on which memoranda are kept of tickets and pools sold, were found not to be gambling devices within the meaning of the statute. Both the mayor and chief of police were found to have had notice before the bringing of this action that such pool room was conducted at the place designated, but not actual knowledge of the fact.

The court found, as matters of law, that selling pools upon horse racing is gambling within the meaning of the

Nebraska statute; that the keeping and maintaining of a room, where the public is invited to come for such purpose, constitute the offense of keeping a room for gambling purposes within the statutes of Nebraska. It found that it is the duty of the mayor of the city of Omaha to see that the criminal laws of the state and the city ordinances are enforced; that it is his duty, through the chief of police and the police force of the city, to ascertain, where he has reason to suppose such to be the facts, whether or not the laws are being violated, and, if such is the case, he should see that a proper information is filed, and that the persons violating the laws are arrested by the police and prosecuted; and that, in case the chief of police or the police force neglect such duty, it is the mayor's province to order them to do it; that it is the duty of the chief of police of his own volition, if he has cause to believe that the criminal laws are being violated, to make an investigation, and arrest persons found breaking the law, and hold them until a complaint is filed and a warrant issued, and to use all lawful means to bring such parties to trial; that, when a complaint is filed, and a warrant issued, it is his duty to arrest the person charged in the complaint, and investigate and ascertain, as far as he can, whether the offense has been committed; after so doing, he should submit his proofs to the officer having charge of the prosecution.

Upon these findings the peremptory writ of mandamus against the mayor and chief of police was allowed, and the costs of the action adjudged against them; and, to obtain a reversal of such order, they now urge, as above stated, that there is nothing to warrant the court's interfering with the administrative functions of the municipal government; that other and better remedies exist; that the mayor and chief of police are under no duty to perform the acts required, and that relators are not acting in good faith.

A moving picture was drawn at the argument of the condition of matters in the city of Omaha, if this court were to interfere by mandamus to control the action of the city's police officers in reference to every trifling offense

against state laws or city ordinances which may take place there. It seems sufficient to say that the upholding of the mandamus issued by the district court in this case does not commit this court to such a position. This objection merely raises an appeal to the sound discretion of the trial court, and not a bar to the action. No claim is made, or can be made, that these officers have a discretion which the courts may not interfere with, as to whether or not they shall discharge their duties under the law. It is quite true, as stated in *People v. Listman*, 40 Misc. (N. Y.) 372, 82 N. Y. Supp. 263:

"The existence, therefore, of the numerous methods described above by which the relator can obtain his object without application to the supreme court, is, in itself, no sufficient answer to such an application. But after all the writ of mandamus is an extraordinary remedy, and whether it shall or shall not be granted in a specified case rests largely in the sound discretion of the court. There is no doubt that there are circumstances where such a power may be wisely exercised. It might well be that cases might arise where the neglect of the municipal officer is so flagrant, where the wrong is of so grave a character and where the public interests involved are so important that the court will not hesitate to resort to this remedy. But it should be used with caution. Ordinarily it is far better that the usual course should be pursued."

The case last cited is reprinted in full in the respondents' brief. In it the New York supreme court, at a special term in Onondaga county, refused a mandamus against a commissioner of public safety of the city of Syracuse, requiring him to enforce general laws prohibiting labor on Sunday, and public dramatic performances on that day. On a complaint made to the commissioner of the character of the performances, he caused two officers to attend one of the performances, which were styled by those conducting them "Sacred Concerts"; on the report of the two officers, the matter was presented to the police justice of the city of Syracuse, who refused to issue a

warrant, on the ground that the concerts were not a violation of law. The commissioner declined to do anything further. An application was made for a mandamus to compel him to attend personally, or cause his officers to attend, the concerts, and to arrest, or cause to be arrested, without a warrant, the persons holding them, if they were found to be an offense against the laws of the city. The supreme court in that case adjudges it better that the performances be proceeded against in the ordinary manner because, if the police judge refused to issue a warrant, recourse might be had to any one of the several other magistrates, and the police judge, if necessary, removed.

The case of *Alger v. Scaver*, 138 Mass. 331, is also cited as refusing a mandamus against a municipal officer. The court say:

"As applications for the writ of mandamus are addressed to the sound judicial discretion of the court, the circumstances of each case must be considered in determining whether the writ shall issue."

The circumstances of this present case have been considered, and the district court, in its discretion, decided that as against the mayor and chief of police the writ shall issue. There certainly does not seem to have been any such abuse of discretion as to call for a reversal of the cause merely because of it. If the duty rested upon the officers to do the things required of them and they were failing in that duty, and the relators are entitled to insist upon its performance, unless there is other clear and adequate remedy, the order allowing the writ should be affirmed.

The second objection is, that there is a clear, adequate and more appropriate remedy existing. To this it seems sufficient to say that the evidence indicates that a number of complaints—one witness for respondents says "eight or ten"—of the violation of law by the conducting of this pool room have been filed; that arrests have been made, followed by the prompt release upon bail of the parties charged, and an immediate resumption of the pool room's

business. If the continuance of that pool room is an open, public violation of the law, the citizens of Omaha, who maintain the police to patrol its streets and prevent such violation, are entitled to have that force used in promptly suppressing such an element of disorder, especially after it appears that ordinary prosecutions do not deter the parties. As Lord Mansfield said of the writ of mandamus: "It was introduced, to prevent disorder from a failure of justice, and defect of police." *Re v. Barker*, 3 Burr. (Eng.) 1266, 1268.

The third objection is, that it is not the duty of the mayor and chief of police to do the acts required. Section 71, chapter 12a of the Compiled Statutes, provides as to the mayor of cities of metropolitan class: "The mayor shall be the chief executive officer and conservator of the peace throughout the city, and shall have power, by and with the concurrence of the board of fire and police commissioners, to appoint any number of special policemen which he may deem necessary to preserve the peace of the city, and to dismiss the same at pleasure." Section 73 makes it his duty to see that the provisions of the law and the city ordinances are enforced. Section 171 of the same chapter provides as to the chief of police: "The chief of police shall be the principal ministerial officer of the corporation; he shall, by himself or by deputy, execute all writs and process issued by the police judge; he, or one of his deputies, shall attend on the sitting of the police court and preserve order therein; and his jurisdiction and that of his deputies in the service of process in all criminal cases, and in cases of the violation of city ordinances shall be coextensive with the county." Section 172: "He shall be subject to the orders of the mayor in the suppression of riots and tumultuous disturbances and breaches of the peace; he may pursue and arrest any person fleeing from justice in any part of the state." Section 173: "He shall have, in the discharge of his proper duties, like powers and be subject to like responsibilities, as sheriffs in similar cases." Among the duties of the sheriff as defined in sec-

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tion 119, article I, chapter 18, Compiled Statutes, are: "The sheriff and his deputies are conservators of the peace, and to keep the same, to prevent crime, to arrest any person liable thereto, or to execute process of law, may call any person to their aid; and, when necessary, the sheriff may summon the power of the county." And section 283 of the criminal code provides: "Every sheriff, deputy sheriff, constable, marshal, or deputy marshal, watchman, or police officer shall arrest and detain any person found violating any law of this state, or any legal ordinance of any city or incorporated village, until a legal warrant can be obtained."

It seems clear that it is the duty of both the chief of police and the mayor to interfere for the prevention of the public violation of the laws, and that seems to be all which is required of the officers by this mandamus; they are to see that the police officers under their charge investigate the alleged open violation of the law at a given place, and arrest such parties as are found in the act of violating it, and are to take measures for their prosecution. If it be granted, as the trial court found, that an open and public violation of the law is going on there, it would seem that it is clearly within the prescribed duties of these officers to take such steps.

The fourth objection raised is, that the action was not instituted or prosecuted by the relators in good faith. This rests upon the trial court's finding that one of the relators, I. J. Dunn, was influenced in his action more by the desire to "affect" one Thomas Dennison than by a desire to enforce the laws of this state. It was, however, found that, so far as the other relator was concerned, the proceedings were in entire good faith. The soundness of this conclusion is not disputed. The relator, Dunn, owned to having taken, as assistant county attorney, various steps toward the prosecution of Dennison on various actions, and declared that a large share of his desire to suppress the pool room was from his belief that Dennison shared in its profits. This, no doubt, together with a mass



of evidence as to Dunn's action as assistant county attorney, the relevancy of which is not perceived, was the basis of the finding, which was in the following terms: "The court further finds, as a matter of fact, that the relator, I. J. Dunn, is not acting in good faith in bringing and prosecuting this action, in this, that he brings and prosecutes this action primarily for the purpose of affecting one Thomas Dennison, and his desire for enforcing the law is a secondary consideration." The court, however, found that the action was not brought nor prosecuted in pursuance of any wrongful conspiracy or combination. The action of the relators seems to have been at the request of a number of prominent and respectable citizens of the city, and there seems no reason, in the fact that Mr. Dunn was actuated by a conviction that Dennison had an interest in the pool room and a desire to drive him out of that business, to dismiss the proceedings. It appears from the evidence of Dennison himself that he has no such interest at the present time, and he declares that such action as he has taken in regard to the pool room was solely on account of friendship for its proprietor, Chucovich. There seems no reason to reverse the action of the district court because of Mr. Dunn's appearance as one of the relators.

The real turning point in the case seems to be the question, whether or not the keeping of a pool room, such as the evidence discloses, is a violation of the law, the prevention of which the courts will enforce by a writ of mandamus. The officers seem to have regarded it, in the words of police commissioner Broatch, as "no more a violation of law than is the grain bucket shop." There seems to have been something like an understanding that the city authorities would not, of their own volition, interfere with its operation, if they were conducted without disorderly accompaniments. No attempt, however, is made at the present hearing to defend the lawfulness of this business. No complaint is made as to the correctness of the district judge's findings, that pool selling is gambling, and that the maintaining of a place where the public are invited to

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come and buy pools upon races is the maintaining of a gaming house, under the laws of this state.

All laws for the suppression of vice are subject to evasion. Doubtless gambling is a vice and so distinguishable from crime. Like all other vices, the most that can be done toward its suppression is to prevent its open and public indulgence to the demoralization of society. So long as the laws of the state of Nebraska make the public maintaining of gambling places unlawful, so long it would seem to be the right of citizens, who believe that openly and publicly advertising them and their business is dangerous and demoralizing to the community, to insist that public officers, selected for that purpose, should carry into execution the laws dealing with such places. It seems sufficiently to appear, in the present case, that ordinary remedies had been tried and found powerless to answer the purpose of the statute in question, the closing up of an open and public gaming house.

It is recommended that the judgment of the trial court be affirmed.

AMES and OLDHAM, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is

**AFFIRMED.**

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EDA MEINHARDT, APPELLANT, v. LEWIS A. NEWMAN ET AL.,  
APPELLEES.

FILED APRIL 7, 1904. No. 13,536.

1. **Agency:** DEATH OF PRINCIPAL. It is not a hard and fast rule, that an agency shall be deemed to have been revoked for all purposes by the death of the principal, as against those dealing in good faith with such agent, without knowledge of revocation, and within the scope of his actual and ostensible authority.
2. **Evidence.** Evidence examined, and held sufficient to sustain the judgment of the trial court.

APPEAL from the district court for Thayer county:  
GEORGE W. STUBBS, JUDGE. *Affirmed.*

*C. L. Richards*, for appellant.

*Kelligar & Ferneau* and *T. C. Marshall*, contra.

OLDHAM, C.

This is an action for the foreclosure of a real estate mortgage on certain lands situated in Thayer county, Nebraska. Defendants answered admitting the execution of the mortgage, and pleading payment to the duly authorized agent of the payee. There was a judgment for the defendants in the court below, and plaintiff appeals.

The facts clearly established by the testimony contained in the bill of exceptions are: In 1881, J. W. Lewis, of Suffolk, Massachusetts, the payee named in the note in controversy, constituted M. H. Weiss of Hebron, Nebraska, his agent for the purpose of loaning, collecting and re-investing money on farm securities in Thayer county, Nebraska. Mr. Weiss continued to act as his agent up to and during the year 1885, when the Blue Valley Bank at Hebron, Nebraska, was organized and Mr. Weiss became its cashier. On the organization of the bank, Mr. Weiss transferred the account of J. W. Lewis to the bank, and credited the bank with profits on the loans and collections made for Mr. Lewis, and an account was opened at the bank with him, more, however, for the convenience of the bank in transacting the business than for the benefit of Mr. Lewis. A large number of loans were negotiated by the bank, and these notes were all made payable to J. W. Lewis, at the Blue Valley Bank. Among others, the loan in controversy was made by the bank to one William T. Jackson for \$700, secured by real estate mortgage. The mortgage provided, among other things, that payments in multiples of \$100 might be made on the principal debt, at any interest payment. Jackson conveyed the lands

covered by the mortgage to the defendant Lewis A. Newman, in the year 1891, who assumed and agreed to pay the mortgage. J. W. Lewis, the payee of the note, died, in 1891, intestate, and Sherman T. Lewis was duly appointed as one of the administrators of his estate. In 1892, defendant Newman paid the interest on the loan, and \$100 on the principal, through his agent, to the Blue Valley Bank; received a receipt from the bank for such payment, and this money was properly transmitted to the administrators of the payee of the note; and the interest coupon and receipt for part payment of the principal were transmitted to the bank and, by the bank, to the defendant Newman. On August 16, 1893, defendant paid in the same manner to the bank, \$48, interest, and \$225 of the principal of the loan, and took its receipt therefor. The bank transmitted the interest of \$48, but credited the payment of \$225 on the principal of the indebtedness to the account of J. W. Lewis at the bank, and did not transmit this to the legal representatives of the payee. In 1894, another payment was made in the same manner, which was duly transmitted, accepted and receipted for. In September, 1895, the Blue Valley Bank suspended, and a receiver was appointed to take charge of its affairs; and in the same year, the administrator of the estate of J. W. Lewis, deceased, assigned the mortgage and note to plaintiff, Eda Meinhardt, in the following manner: "For value received, I, Sherman T. Lewis, administrator of the estate of J. W. Lewis, deceased, hereby assign and fully transfer to Eda Meinhardt, heirs and assigns forever, one certain mortgage executed by William T. Jackson and Annie M. Jackson, his wife, to J. W. Lewis, bearing date August 18, 1890, and recorded, etc., \* \* \* also the promissory note accompanying said mortgage and mentioned therein, and for the security of which said mortgage was given." This transfer was duly acknowledged before a notary public. In 1896, a similar assignment of the mortgage and note was executed by each of the heirs of J. W. Lewis, deceased, and these assignments were recorded in the office of the

register of deeds in Thayer county, in 1896. The assignment of the heirs was taken after the maturity of the note, and was recorded nearly 3 years after the payment in dispute had been made.

The only question at issue on the trial of the case in the court below was as to the credit of the \$225 payment on the principal sum of the indebtedness made as above stated. All the remainder of the indebtedness, if this credit is allowed, has been duly paid. There is no contention that plaintiff is an innocent purchaser of this note by indorsement under the law merchant; and plaintiff virtually concedes that the evidence is sufficient to establish an agency in the Blue Valley Bank for the collection of the interest and principal by its dealings with J. W. Lewis, deceased, but it is strongly contended that this agency was terminated by the death of J. W. Lewis, and that thereafter defendant dealt with the bank at his peril.

It is not, however, as contended by plaintiff, a hard and fast rule that, under all circumstances and in the face of intervening equities, the death of a principal absolutely nullifies and renders of no effect the acts of an agent, dealt with in good faith and in view of his apparent authority, by one who does so, without notice of the revocation of his authority. This view is well illustrated by the holding of this court in *Deweese v. Muff*, 57 Neb. 17, in which NORVAL, J., after a careful review of the authorities, quotes with approval the following language from the opinion in *Ish v. Crane*, 8 Ohio St. 520, 540:

"Now upon what principle does the obligation, imposed by the acts of the agent after his authority has terminated, really rest? It seems to me the true answer is, public policy. The great and practical purposes and interests of trade and commerce, and the imperious necessity of confidence in the social and commercial relations of men, require that an agency, when constituted, should continue to be duly accredited. To secure this confidence, and consequent facility and aid to the purposes and interests of commerce, it is admitted that an agency, in cases of actual

revocation, is still to be regarded as continuing, in such cases as the present, toward third persons, until actual or implied notice of the revocation. And I admit, that I can perceive no reason why the rule should be held differently in cases of revocation by mere operation of law."

Now, it will be remembered that each of the payments made by the defendant on this mortgage indebtedness had been made after the death of the payee, and all, except the \$225 in dispute, had been transmitted by the bank to the representatives of the deceased and had been properly accounted for. It is also in evidence and undisputed, that a large number of other collections, some of interest and some of principal, had been made by the bank for one of the administrators after his appointment and qualification as such. That after his qualification, he sent to the bank for a statement of its dealings with the intestate, and for a list of mortgages negotiated by it, and that such was duly furnished by the bank. That when the bank failed and passed into the hands of a receiver, the \$225 paid by defendant was found credited to the J. W. Lewis account kept at the bank.

Now we think it could not be disputed that had J. W. Lewis, in his lifetime, revoked the agency of M. H. Weiss, and the Blue Valley Bank, to collect his loans and reinvest his money, and had he failed to notify those doing business with that institution under its real and apparent authority as agent, he would not in conscience have been heard to say, as against those honestly dealing with the institution, that its agency had been revoked. And if, as set forth in *Devese v. Muff*, *supra*, the same rule should apply on revocation by death, then we think that the conduct of the administrator in his dealings with the bank with reference to loans and collections made for his intestate, should now estop the representatives and heirs of the deceased from asserting the revocation of this agency by the death of the principal. That the note and mortgage were a part of the same transaction is alleged in the petition and admitted in the arguments; that the privilege of

paying \$100, or any multiple thereof, on the principal debt at any interest payment, was brought home to the plaintiff by the possession of the mortgage, is not disputed, as was also notice of the fact that part of the principal had been paid under this option before she took the assignment.

There is another question urged by appellees that would probably be fatal to a reversal of this case, and that is, that there was no evidence of any kind in the record tending to show that no action at law had been had on the note before foreclosure proceedings were instituted. This allegation was contained in the petition and denied by the answer. But as we deem the evidence sufficient to sustain the judgment of the trial court on the merits of the controversy, we refrain from saying just what judgment we should have rendered in this trial *de novo* for want of this technical proof, had no other substantial defense been interposed.

We conclude, however, that the evidence is sufficient to sustain the judgment of the trial court on the merits of the controversy, and we recommend that it be affirmed.

AMES and HASTINGS, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, it is ordered that the judgment of the district court be

AFFIRMED.

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DANIEL ISAACS, APPELLEE, v. RACHEL DAVIS ISAACS,  
APPELLANT.

FILED APRIL 7, 1904. No. 13,426.

1. **Antenuptial Agreements.** While antenuptial agreements may essentially alter the interest which either the husband or wife takes in the property of the other, they can not vary the terms of the conjugal relation itself; they can not add to or take away the personal rights and duties of husband and wife.
2. ———. An antenuptial agreement by a man about to be married,

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that, after marriage, he will reside in a particular state, can not be enforced.

3. **Domicile.** The general rule is that the domicile of the husband is the domicile of the wife.
4. ———. The wife is bound to follow her husband when he changes residence, if such change is made in good faith.
5. **Husband and Wife: SUPPORT.** When a wife, without just cause, refuses to live with her husband, he is not required to contribute to her support.
6. **Divorce and Alimony.** When a wife, without cause, refuses to live with her husband, and the evidence shows that she did not assist in or contribute to the accumulation of any of his property, but that it was all accumulated by him prior to their marriage, the husband, on obtaining a divorce on the ground of desertion, will not be required to pay alimony.
7. **Evidence.** Evidence examined, and held to fully sustain the findings and judgment of the trial court.

APPEAL from the district court for Wayne county:  
JAMES F. BOYD, JUDGE. *Affirmed.*

*Wilbur & Berry*, for appellant.

*A. A. Welsh*, contra.

FAWCETT, C.

This is a suit by plaintiff for a divorce on the ground of desertion, with a petition in the usual form. Defendant, answering, admits the marriage and denies all the other allegations of plaintiff's petition, and, for cross-petition, asks for a divorce on the grounds: First, of desertion; and, second, failure to support. She bases her claim of desertion on the allegations that, prior to her marriage with the plaintiff, he agreed with her that he would make his home, after their marriage, in the state of Ohio; that without this promise she would not have married him; that on or about the first day of November, 1900, being the same year in which they were married, plaintiff left the defendant in Cincinnati, stating that he was going to Ironton, Ohio; and that instead of going to Ironton he



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came to Wayne county, Nebraska, without the consent or knowledge of the defendant. For reply, plaintiff says that, prior to his marriage with defendant, he expected to make his home, after their marriage, in the state of Ohio; that, after their marriage, he made numerous efforts to get into business or to obtain employment in that state, but was unable to do so, whereupon he repeatedly solicited the defendant to come to Wayne county, Nebraska, to make their home, but that defendant refused and has ever since refused; and in November, 1900, plaintiff, being unable to find a place in Ohio suitable and satisfactory, came to Wayne county, Nebraska, where he had resided prior to their marriage, and where he owned a well improved farm of 320 acres of land; that since coming to Wayne county he has repeatedly requested defendant to come and live with him, and, upon her refusal so to do, has offered to return to Ohio and make his home there, if defendant would live with him, but that defendant refused to live with him either in Nebraska or Ohio; that he is now ready and willing to provide a home and live with the defendant either in the state of Nebraska or the state of Ohio, and offers to return to Ohio and live with the defendant; alleges that for a long time prior to his marriage with defendant, he had resided in Wayne county, Nebraska, with his family, consisting of 5 children by a former wife, then deceased; that defendant has never contributed in any manner to the accumulation of any of the property of plaintiff or assisted in the care thereof; that defendant is possessed of a one-fifth interest in a house and lot in Norwood, Ohio, where she resides with her sisters, as the co-owners thereof; that he has always been ready and willing to contribute to the support of defendant, and has sent her money, which defendant has refused to receive.

The evidence shows that the parties were married in April, 1900; that defendant had a decided aversion to coming to Nebraska, preferring to live in Ohio, where she had lived all her life, and where plaintiff had spent the early years of his life; that, after the marriage, they came

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to Nebraska and spent a couple of months together on plaintiff's farm in Wayne county, defendant returning to Ohio during the summer, and plaintiff agreeing to follow her in September. In September, plaintiff returned to Ohio in accordance with this arrangement, and began his efforts to get into a business of some kind which he would be able to manage, or, failing in that, to obtain some suitable employment. He seems to have been quite persistent in his efforts in this direction. The evidence satisfies us, as it doubtless did the trial court, that those efforts were made in good faith, and that he did everything in his power to gratify the wish of his wife. On the evening of November 4, 1900, he returned to the defendant's old home, where she was living with her sisters while he was making the efforts to secure a business, above referred to, feeling rather discouraged at another failure of his plans. Defendant seems to have been angry at him on account of this failure, and told him he could not stay there that night. After some talk between them, she partially relented and permitted him to remain in the house that night, but refused to occupy the same room with him, telling him that he would have to occupy another room, which he did. The next morning he left her with the understanding that he would make another trip to Ironton, and try and make some kind of an arrangement by which they could move there. After leaving the house, under the effects of the chilly reception which he had received the evening before, he said he was feeling homesick, and concluded that he would take a trip to Nebraska; so, instead of going to Ironton he took the train for Omaha. The first thing he did after arriving in Omaha was to write to his wife, telling her what he had done, and expressing sincere regret that he had left her and come to Nebraska without telling her that he was going to do so, and asked her forgiveness for having done so. He waited some time, and, receiving no answer, he again wrote her from his farm in Wayne county. Receiving no answer to that, he wrote a third letter. To this he received this answer:

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"NORWOOD, OHIO, December 16, 1900.

"*Mr. Isaacs*—Sir: You deserted me once for all. I will have nothing more to do with you. You have made many good promises to me but kept none of them. I do not want you to come back to Ohio, as you left me without a cause. Hoping this will be satisfactory, I remain,

"RACHEL DAVIS ISAACS."

Notwithstanding this letter plaintiff kept writing to his wife, urging her to reconsider the matter, calling her attention to the fact that he had been unable to get into business in Ohio, that he had a good home in Nebraska and could support her in proper manner here. Finding that she would not yield, he then wrote her that he would return to Ohio and secure a home for them there. Receiving no word from her, in the fall of 1901 he returned to Ohio, learned where she was stopping, and went to the house between 7 and 8 o'clock in the evening, to see her. In answer to his rap at the door she appeared and, on observing who it was, slammed the screen door shut and retired to another room in the rear of the house. He went around to the window and importuned her to talk the matter over with him. She finally told him to go around to the door, where she met him, but she kept the screen door closed and would not permit him to enter. He reasoned with her there, and offered to return to Ohio, but she was obdurate, claiming that he had blasted her life and that she would not have anything more to do with him. He tried to have an interview with her the next day, which she refused to grant, claiming that she had a prior engagement. After remaining in Ohio a while he returned to Nebraska; but, before leaving, left a letter with her sister, to be forwarded to her. She answered this letter November 3, 1901, saying:

"*Mr. Isaacs*: Your letter received about a week ago, in which you make some very good promises if I would live with you. I trusted you once on your good promises until you failed to keep one of them, and asked me to work for

my board, which was more than I could endure. I was not conscious at the time that you had any intention of leaving me to fight my way through the world as your wife, which has caused me many a heart ache and blighted my life forever. You wished me to write you this one letter, which I will do, as I promised. I always thought you would support me until I gave you the opportunity, then I found I was very much mistaken. You said as I had an interest in our home I could live there, which is very true; I could; at the same time I could not eat the house nor dress with it. On the other hand it takes money to keep the house in repair and I must do my part as I have no one to do for me since my married life has been a failure. Hoping you will always be happy with your family, will close. From  
RACHEL DAVIS ISAACS."

To this plaintiff replied, saying, among other things:

"Now, my dear wife, I hope you will not be offended by my writing you this time; you know we are tied together for life and there is not a day but I think of it a thousand times and am willing to do anything I can in order that we can live together. \* \* \* I will send you money as soon as you send me your address, and I am going to ask you won't you please promise to live with me so I can close the deal on the home I have in view in Jackson county, Ohio, and I will promise that I will try to do all I can to make our home happy, and I will do as I say. As soon as I close the deal I will send the papers to you to hold, and I can not tell you how glad my children would be if we were living together. If you get this letter please write so I can close the deal if you will consent. This from your loving husband,  
DANIEL ISAACS."

He wrote her again on December 16, in which, among other things, he says:

"Now, Rachel, it was a mistake on my part. I hope you will forgive me. I am going to ask you to write yourself and if you will state any terms that I can comply with

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I will be glad to do it for I think we could live happy if we only get started. I can rent or sell my farm to good advantage, and I can go back east to live. \* \* \* Now, my dear wife, if you will forgive me the past I will be glad to send money to support you until we can get to living together, and I hope I will get to hear from you soon. This from your loving husband,  
DANIEL ISAACS."

In this letter he enclosed a draft for \$25 as a Christmas gift. The letter, envelope and draft were all returned to him by the defendant, with this endorsement on the letter: "December 31, 1901. Opened, read and returned by Rachel Davis Isaacs."

The above are only brief extracts from the many kind and affectionate letters written by plaintiff to the defendant, urging her to forgive him for the one slight error of coming to Nebraska in November, 1900, without previously informing her of his intention so to do. This act of his she construes into a great wrong: One which, she says, blasted her life, and which she was never willing to forgive. We are absolutely unable to conceive how defendant could have become imbued with such a silly idea. The alleged antenuptial agreement, that he would always live in Ohio, was void. As stated by counsel for appellee, "Valid antenuptial contracts can only be made with reference to the property of one another and their rights thereto. They change and control the general rule of the marriage state in reference to property only." And, as stated in Schouler, Domestic Relations (3d ed.), sec. 171: "They can not vary the terms of the conjugal relation itself; they can not add to or take away from the personal rights and duties of husband and wife; but they may essentially alter the interest which each takes in the property of the other." The general rule is that the domicile of the wife follows that of the husband and that he has the right to fix their domicile; the wife is bound to follow the husband when he changes his residence, if such change is made in good faith. The authorities in support

of this principle are so numerous and uniform that it is unnecessary to cite them. But, conceding that plaintiff had agreed, prior to the marriage, that he would always live in Ohio; if, after the marriage, he, in good faith, tried to secure employment or a business of some kind there and was unable to do so, and had a good home of 320 acres of land in Wayne county, Nebraska, at his disposal, he had a perfect right to return to that home and to insist that his wife should go there with him, and her refusal so to do would constitute desertion on her part. He was under no obligation to surrender his home that he had worked years to establish, and return to Ohio and engage in a business enterprise, without experience, and possibly, nay, probably, lose the earnings of years in that enterprise; and if the defendant had even the faintest conception of her marital duties, she would not have required him to continue tramping around through the state of Ohio seeking employment or business, but would have promptly and cheerfully accompanied him to the good home which he had already established in Nebraska.

A sufficient answer to defendant's plea of nonsupport is that a man is not required to support his wife when she, without just cause, refuses to live with him.

From the questions asked by defendant's counsel on the trial of the case, it is apparent that defendant cares nothing about the marriage relation or as to who succeeds in obtaining the decree of divorce, provided she is given a goodly portion of the property, which she never assisted the plaintiff to accumulate. If the trial court had awarded her even a very small amount of alimony, we are satisfied that this court never would have been troubled with an appeal in this case. On the trial the court awarded her \$100 for expense money in defending the suit, but, after hearing the case, refused to allow her any alimony, and ordered that each party pay their own costs. This is the part of the decree that was grievous to defendant; but we think the court did right. When a wife, absolutely without cause, deliberately refuses to live with

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her husband, and has not helped to accumulate any of his estate, we know of no law which entitles her to alimony.

We have read the record very carefully, and are unable to discover any error therein. The judgment of the district court is right in all respects and should be affirmed; and we so recommend.

ALBERT and GLANVILLE, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is

AFFIRMED.

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CITY OF SOUTH OMAHA V. JOHN RUTHJEN.

FILED APRIL 7, 1904. No. 13,545.

1. Instructions. Instructions given and refused examined, and held to be without prejudice.
2. Witnesses: VALUES. Persons who have resided for several years and own property in the immediate neighborhood of property alleged to have been damaged by grading a street in front of such property, and who seem, upon examination, to be well informed of its situation, condition and value, are competent witnesses on the question of its value.
3. Interest. Where the plaintiff in an action does not pray for interest, none can be recovered.

ERROR to the district court for Douglas county: GUY R. C. READ, JUDGE. *Affirmed upon condition.*

*Murdock & Cohn and E. R. Leigh, for plaintiff in error.*  
*W. R. Patrick, contra.*

FAWCETT, C.

This action was commenced by defendant in error, hereinafter styled plaintiff, against the plaintiff in error, hereinafter styled defendant, to recover \$200 damages, which plaintiff claims to have sustained by reason of the grading of a portion of 12th street in South Omaha in

front of his premises. He alleges that the defendant cut the street down in front of his premises to a depth of about 6 feet without first establishing a grade upon said street, and without providing for the payment of damages occasioned thereby; that on October 7, 1901, he gave defendant written notice of his claim for such damages. The prayer of his petition is "for the sum of \$200, together with costs of this cause." For answer the defendant admits that certain grading was done in front of plaintiff's premises; denies that it was done by or under the direction or authority of the city; denies that defendant had authority under its charter to do the work in the manner alleged; alleges that the work was done by parties desiring an opening through from 13th street easterly to the river; alleges that the work was done in accordance with the specific permission of the plaintiff and at his request and sanction; denies that plaintiff has been damaged, but alleges that by reason of the grading the property of the plaintiff has been benefited and its value greatly increased. The reply is a general denial. There was a trial to the court and a jury, resulting in a verdict in favor of the plaintiff for \$220.71. Judgment was entered upon this verdict, motion for new trial overruled, and the case is now here on error.

Defendant claims that it is entitled to a reversal of this case for the following reasons: "(1) The trial court erred in giving instruction numbered 2 of the instructions given on its own motion. (2) The trial court erred in giving instruction numbered 4 of the instructions given on its own motion. (3) The trial court erred in refusing to give instruction numbered 3 of the instructions requested by the defendant. (4) The trial court erred in permitting the witnesses Ma Dru and B. Tangeman to testify, over the objection of defendant, to the value of plaintiff's property." These are the only assignments argued in defendant's brief, and under the well established rule in this court they are the only ones that will be considered.

Instruction numbered 2 complained of is as follows:



"The burden of proof is upon the plaintiff to establish by a preponderance of the evidence each of the material allegations of his petition not admitted by the answer; and the burden of proof is upon the defendant to establish each of the affirmative allegations of his answer."

It is evident that counsel does not object to this instruction in and of itself, but complains that the court nowhere else in its instructions tells the jury what the material allegations are in either the petition or answer. If either the petition or answer contained immaterial matter, the position taken by defendant would be sound, but we think the case comes clearly within the rule laid down by this court in *Murray v. Burd*, 65 Neb. 427. Neither the petition nor answer contains any immaterial matter. Both pleadings are more than ordinarily brief and explicit in cases of this kind, and we think that instruction numbered 2, taken in connection with the statement of the issues contained in instruction numbered 1, preclude the idea that the jury could in any manner have been misled by being left in doubt as to what matters were for their consideration.

Instruction numbered 4 is as follows:

"If you find from the preponderance of the evidence that the grading in front of the plaintiff's premises was done, either by virtue of the resolution of the city council introduced in evidence, or by the employees of the defendant city, under the instruction of its officers or any of them, and any damage was occasioned to the plaintiff's property thereby, your verdict should be for the plaintiff."

It is argued by defendant that under this instruction the jury would have been warranted in holding the defendant liable if the work had been done under the instruction of a single councilman or any other officer of the city. As an abstract proposition counsel is right, and the instruction is wrong; but, in the light of the evidence in this case, we do not see how the jury could possibly have been misled by it. There is no conflict in the evidence as to the fact that the work was done by the city's grading

gang, under the supervision of a city street boss, and, in fact, we think the evidence fairly shows that it was done under the supervision of the city engineer himself. Be that as it may, there is absolutely no claim that any officer unauthorized to act in a case of this kind assumed to act. If such had been the case, the instruction might have been prejudicial; but in this case, we can conceive of no possible manner in which the defendant could have been prejudiced by the giving of it.

Instruction numbered 3 requested by the defendant and refused by the court is as follows:

"You are instructed that in determining the amount of damages resulting to plaintiff, if any, by reason of the excavations aforesaid, you shall take into consideration the benefits accruing to plaintiff's property, if any, by reason of the grading aforesaid."

We do not think any discussion is necessary to demonstrate the correctness of the court's action in refusing this instruction. Under it, the jury would have been warranted in taking into consideration general benefits, which can not be done.

We have examined the testimony of the witnesses Ma Dru and Tangeman very carefully, and are unable to agree with counsel for defendant that the court erred in permitting these witnesses to testify as to the value of plaintiff's property. On their direct examinations they were asked if they knew the value of this property, and they answered, "Yes." Counsel for defendant did not then question them upon this point, but simply rested upon his objection that sufficient foundation had not been laid. This objection was not well taken. Subsequently, on cross-examination, he sought to show that they had not sufficient knowledge to entitle them to testify; but in this we think he failed. While their cross-examinations show that they are not what would be termed experts, yet it does fairly show that they were well acquainted with the property; that they had considerable knowledge of the values of adjoining property; that they owned property

themselves within a block or two of the property in controversy; and, in fact, they showed as much knowledge as is usually shown on the part of witnesses classed as non-expert witnesses.

The verdict was for \$220.71, when the prayer of the petition was for \$200 and costs. The court in its instruction authorized the jury to add interest to whatever amount it might find due to plaintiff as damages. This should not have been done, as the plaintiff does not pray for interest, but simply prays a judgment for \$200 and costs. Plaintiff should therefore enter a remittitur for \$20.71.

While the instructions given by the court are not as full and explicit as instructions in such case should be, yet an examination of the entire record satisfies us that the court has not committed any prejudicial error.

We recommend that if plaintiff shall within 20 days from the filing of this opinion enter a remittitur for \$20.71, the judgment be affirmed; otherwise, that it be reversed.

ALBERT and GLANVILLE, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, it is ordered that if plaintiff shall within 20 days from the filing of this opinion enter a remittitur for \$20.71, the judgment of the trial court shall stand affirmed; otherwise, that the same be reversed and remanded for a new trial.

JUDGMENT ACCORDINGLY.

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ADAMS COUNTY ET AL. V. KANSAS CITY & OMAHA RAILWAY  
COMPANY.

FILED APRIL 7, 1904. No. 13,185.

1. **Statute: ELEVATORS.** An elevator is a storehouse within the meaning of section 39, article I, chapter 77, Compiled Statutes, 1899.
2. ———: **CONSTRUCTION.** The phrase "outside of said right of way,"

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- etc., in the proviso to said section qualifies only the word "property" immediately preceding it, and not the specific terms used in the enumeration of other classes of property therein.
3. **Elevators: ASSESSMENT.** By virtue of such proviso, elevators situate on the right of way of a railroad are subject to assessment by the local authorities, and not by the state board; and that they may be necessary for the successful operation of the road is immaterial.
4. ———: ———. The owner of such elevators can not escape local assessment thereon, and taxes levied in pursuance thereof, by voluntarily listing and returning them for taxation to the auditor of public accounts, and the payment of the taxes levied by the state board.

ERROR to the district court for Adams county: ED L. ADAMS, JUDGE. *Reversed and dismissed.*

*Snider & Logan*, for plaintiffs in error.

*C. F. Manderson, M. A. Hartigan, R. G. Brown, M. A. Reed, J. W. Deweese and F. E. Bishop, contra.*

ALBERT, C.

This action originated in the presentation of a claim for the repayment of taxes paid under protest for the year 1900, to the county board of Adams county, which was rejected. Appeal was taken to the district court and submitted on an agreed statement of facts, which, so far as is material at present, is as follows: 1. It is admitted that the Kansas City & Omaha Railway Company is a corporation, created and existing under the laws of the state of Nebraska. 2. That its line of railway passes through the southern portion of Adams county, from east to west, and that there is situate on said railway the village of Le Roy and the village of Pauline in Adams county, Nebraska. 3. It is further admitted that the Kansas City & Omaha Railway Company is owner in fee of its right of way in Adams county, Nebraska, through and over which it passes. 4. It is further admitted that the Kansas City & Omaha Railway Company has erected at the villages of Le Roy and Pauline, as aforesaid, elevators, which

elevators are erected and built upon piers of stone, brick and wood, and that the same are used by lessees in a general grain elevator business in buying and shipping grain to be transported over said railway company's line of road. And there is contained in said elevators, machinery, boilers, engines and other agencies for the handling, unloading and loading of grain received for shipment. And that said elevators are situate within and upon the right of way of said railway company. 5. It is further admitted that said railway company, for the year 1900, listed with the auditor of public accounts for the state of Nebraska, among other items of property, said elevators situate at Le Roy and Pauline, Adams county, Nebraska, and that said railway company has paid taxes levied against it by the state board of equalization. 6. That said elevators, with the machinery therein contained, were by the local authorities of Adams county, duly assessed as personal property, for the year 1900, in the precincts respectively of their location in the said Adams county, Nebraska, and that the taxes so levied and assessed were, by the said railway company, paid under protest, and this action brought to recover the money so paid. 7. It is further admitted that the populations of the village of Le Roy and of the village of Pauline do not exceed 200 in each instance; that in the village of Pauline there is located a grain elevator other than the one taxed to said railway company, and the same is operated by parties who buy, sell and ship grain, doing a general elevator business. 8. It is further stipulated and agreed that both the elevator at Le Roy and the elevator at Pauline were, during the year 1900, and prior and subsequently thereto, leased by said railway company, for value, to parties operating the same as general grain elevators, buying, selling grain and shipping the same over the line of said railway company. 9. That said railway company is not engaged in the purchase and selling or the receiving for storage of grain, but operates said line as a common carrier, transporting freight and passengers for hire. That there are numerous

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grain elevators along said railway company's line of road, and other lines of railroad in Adams county, Nebraska, owned and operated by private parties.

The county claims that the judgment of the district court is not sustained by the evidence, and is contrary to law. On the stipulated facts, the court found for the plaintiff, and entered a decree accordingly. The defendants bring error.

The principal question in the case is, whether the elevators were subject to assessment by the local authorities. The question should be answered in the affirmative, unless the property is exempt from such assessment by the provisions of section 39, article I, chapter 77, Compiled Statutes of 1899, in force when the taxes in question were levied. By the provisions of that section, railroad and telegraph companies were required to return to the auditor of public accounts for taxation by the state board of equalization the number of miles of such railroad and telegraph lines in each organized county in the state, and the total number of miles in the state, including the railroad bed, right of way and superstructures thereon, main and side tracks, depot buildings and depot grounds, section and tool houses, rolling stock and personal property necessary for the construction, repairs or successful operation of such railroad and telegraph lines. Then follows this proviso:

*"Provided, however, That all machine and repair shops, general office buildings, storehouses and also all real and personal property outside of said right of way and depot grounds as aforesaid, of and belonging to any such railroad and telegraph companies shall be listed for purposes of taxation by the principal officers or agents of such companies, with the precinct assessors of any precinct of the county where said real or personal property may be situated, in the manner provided by law for the listing and valuation of real and personal property."*

The plaintiff contends that each of the terms used in the proviso, to designate the different classes of property,

is qualified by the phrase, "outside of said right of way," etc.; and, consequently, that the location of the property, and not its character or use, is the test whereby to determine whether it should be assessed by the state board, or by the local authorities. We do not think the proviso will admit of that construction. As was said by POST, J., in *Chicago, B. & Q. R. Co. v. Hitchcock County*, 40 Neb. 781:

"The provision under consideration is not found in the revenue law of 1879, but was adopted as an amendment thereto in 1881. By the original act railroad companies were required to return to the auditor of public accounts for taxation, not only the number of miles of track, rolling stock, depot grounds, repair shops, furniture and fixtures, but all other personal property belonging to the corporation. The declared purpose of the amendment is to except from the operation of the above general provision the property enumerated therein, including all real and personal property outside of the company's right of way and depot grounds."

To read the proviso as the plaintiff contends it should be read, it would mean no more than that the real and personal property outside the right of way and depot grounds, were thereby excepted from the general provisions of the section. Had the legislature thus intended, it is not likely they would have followed a specific enumeration by general terms sufficiently comprehensive to include all the preceding terms, and it is still less likely that the learned judge, who prepared the opinion in the case referred to, would have fallen into the same error of composition, had he thus understood the proviso. Besides, from the word "also," following the conjunctive, and the repetition of the collective "all," it is clear, we think, that the phrase, "outside of said right of way," etc., was intended to qualify only the word "property" immediately preceding it.

It is true, in *Chicago, B. & Q. R. Co. v. Hitchcock County, supra*, there is one sentence which, taken by itself, would indicate that the court there held that the location

of property was the arbitrary test whereby to determine what property came within the exceptions of the proviso. But the property, which gave rise to the controversy in that case, consisted of rails, ties and other material for the construction of a railroad, and was outside the right of way. The court held that the location was the test. The language of the opinion must be read and understood in the light of the facts then before the court. That the court, in applying the test in that case, had reference exclusively to personal property, and had no intention to commit itself further than was necessary to a decision in the case before it, is clear. In the present case, the property consists of elevators, located on the plaintiff's right of way, and the question now arises, whether they fall within any of the exceptions of the proviso. The only term in the proviso, which could include elevators on the right of way, is the term "storehouses." A storehouse is "a building for keeping goods of any kind, especially provisions; a magazine \* \* \* a warehouse." Webster. A warehouse is "a house in which wares or goods are kept; a storehouse." Century Dictionary. In *County of Erie v. Erie & Western Transportation Co.*, 87 Pa. St. 434, the court defines elevators as "warehouses for the storage and ready shipment of grain." Throughout that opinion the court uses the term elevators, warehouses and storehouses interchangeably. In *Metz v. State*, 46 Neb. 547, this court held, that a corn crib is a storehouse, within the meaning of the statute defining burglary. From the foregoing definitions, we are thoroughly satisfied that elevators are included within the term storehouses and are among the exceptions contained in the proviso in question.

The foregoing disposes in part, at least, of another contention of the plaintiff's, namely, that the elevators are exempt from local assessment, because they are "necessary for the successful operation" of the road. It is a familiar rule of construction that specific provisions control those which are general. By the general provisions of section 39, the right of way and superstructures thereon,



are exempt from local assessment. But the proviso specifically excepts storehouses, which, as we have seen, include elevators, from the operation of the general provisions preceding it. The specific provisions of the proviso, therefore, must be held to control the general provisions of the section, and to except elevators from the operation thereof.

It is next urged that the elevators, having been assessed by the state board, and the taxes levied thereon having been paid, the plaintiff, if defeated in this action, will be required to pay double taxes on the same property. This, under ordinary circumstances, would constitute a strong appeal, but it loses much of its force in view of the facts in this case. The plaintiff voluntarily listed and returned the elevators, with its other property, to the state board for taxation. A belief that they were assessable by the state board, and not by the local authorities, could arise only from, what appears to us, a most extraordinary and forced interpretation of the language of the legislature. To relieve the plaintiff from the taxes levied by the local authorities, under such circumstances, would be to permit it, by its own act, to divest the local authorities of their legal power to assess the property. The suggestion is not to be tolerated. The taxes levied by the local authorities are lawful, and no escape from their payment suggests itself. As to the taxes levied by the state board, they were not levied on the elevators specifically; the value of the elevators was simply taken into account in fixing the value per mile of the railroad; and every county through which the line passes, shares in whatever increase of taxes resulted from listing the elevators with the state board for taxation. It is obvious, therefore, that in this action the court is powerless to relieve against the taxes assessed by the state board.

It is therefore recommended that the decree of the district court be reversed and the cause remanded, with directions to enter a decree dismissing plaintiff's cause of action.

GLANVILLE, C., concurs.

By the Court: For the reasons stated in the foregoing opinion, the decree of the district court is reversed and the cause remanded, with directions to enter a decree dismissing plaintiff's cause of action.

REVERSED AND DISMISSED.

BARNES, J., dissenting.

I am unable to concur in the majority opinion for the following reasons: It was conceded on the trial that the elevators in question are situated upon the depot grounds and right of way proper of the railroad company; that is to say, within its 100 feet of right of way, and on its depot grounds. It was further conceded that the railroad company was not engaged in buying and selling grain, and did not use the elevators for that purpose; that the structures were built by the company for the accommodation of the public, and were leased to local grain dealers, who purchased and stored grain therein to be transported to market by the railroad company as a common carrier; that it received for the use of the elevators the nominal sum of 50 cents a month; that it had properly returned them along with its other taxable property to the auditor of public accounts for valuation and assessment by the state board of equalization; that they had been so assessed, and that the company had paid its taxes thereon for the year in question; that, notwithstanding this fact, the local authorities had again taxed the property and the company had paid the taxes, amounting to about \$20, under protest, and that this action was brought for the purpose of recovering the same.

Section 39, article I, chapter 77 of the old revenue law (Compiled Statutes, 1899), under which the assessment in question was made, reads as follows:

"The president, secretary, superintendent or other principal accounting officers within this state of every railroad or telegraph company, whether incorporated by any law

of this state or not, when any portion of the property of said railroad or telegraph company is situated in more than one county, shall list and return to the auditor of public accounts for assessment and taxation, verified by the oath or affirmation of the person so listing, all of the following described property belonging to such corporation on the first day of April of the year in which the assessment is made within this state, viz.: The number of miles of such railroad and telegraph line in each organized county in this state and the total number of miles in the state, including the road-bed, right of way, and superstructures thereon, main and side tracks, depot buildings, and depot grounds, section and tool houses, rolling stock, and personal property necessary for the construction, repairs or successful operation of such railroad and telegraph lines; *Provided, however,* That all machine and repair shops, general office buildings, storehouses, and also all real and personal property, outside of said right of way and depot grounds as aforesaid, of and belonging to any such railroad and telegraph companies shall be listed for purposes of taxation by the principal officers or agents of such companies, with the precinct assessors of any precinct of the county where such real or personal property may be situated, in the manner provided by law for the listing and valuation of real and personal property."

Section 40 provides, in substance, that as soon as practicable after the auditor has received the returns mentioned in the preceding section, or procured the information necessary therefor, a meeting of the state board of equalization shall be held for the purpose of assessing the property so returned; that after such assessment is made by the said board, the auditor shall certify to the county clerks of the several counties in which the property returned is situated, the assessment per mile, and the amount in each of said counties, and that "All such property shall, for the purpose of taxation, be deemed 'personal property,' and be placed on the tax list as hereinafter provided." (Construing this law in the case of *Chicago*,

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*B. & Q. R. Co. v. Hitchcock County*, 40 Neb. 781, we used the following language:

"It is contended by the plaintiff that the character of the property and use for which it is designed, and not its precise location, is the test which should be applied in determining whether it is taxable by the state board or the local authorities, but we can not so construe the section mentioned without ignoring the plain language of the proviso. It would seem that the intention of the legislature was rather to provide a fixed and arbitrary rule for the taxation by the state board of the property of railroad and telegraph companies within their right of way and depot grounds, and all other property by the local authorities."

The facts in this case bring it clearly within the rule above stated. The decision quoted from is supported by *Red Willow County v. Chicago, B. & Q. R. Co.*, 26 Neb. 660; *Burlington & M. R. R. Co. v. Lancaster County*, 15 Neb. 251; *Burlington & M. R. R. Co. v. Lancaster County*, 7 Neb. 33, and in the opinion of the writer we should not overrule these decisions, and at this time adopt a new construction of the statutes.

Again, it clearly appears from the record that these elevators were built by the railroad company, and leased for merely a nominal sum for the purpose of enabling the lessees to collect and store grain therein to be shipped over its lines for gain or hire; and they may be fairly said to be structures proper and necessary for the successful operation of the road, and especially is this true where, as in this case, there are no grain elevators at the stations in question owned by private persons or individuals which can be used for that purpose. They are, for that reason, exempt under the statute quoted, from taxation by the local authorities. *Herter v. Chicago, M. & St. P. R. Co.*, 114 Ia. 330; *Chicago, M. & St. P. R. Co. v. Board of Supervisors*, 48 Wis. 666; *Milwaukee & St. P. R. Co. v. City of Milwaukee*, 34 Wis. 271, and *Red Willow County v. Chicago, B. & Q. R. Co.*, *supra*.

For the foregoing reasons, together with the fact that

the majority opinion herein results in subjecting the railroad company to double taxation, a thing which we should not sanction, the judgment of the district court should be affirmed.

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MARY A. TOPPING, APPELLEE, v. JACOB COHN, APPELLANT.

FILED APRIL 7, 1904. No. 13,484.

1. **Accretions.** Where the water of a river gradually recedes, changing the channel of the stream and leaving the land dry which was theretofore covered by water, such land belongs to the riparian proprietor.
2. ———. Where, at the time of a grant from the United States, the bank of a river formed a part of the boundary of the grant, subsequent accretions formed by the gradual recession of such bank attached to and became a part of the grant.
3. ———: **SUBSEQUENT CONVEYANCES.** A subsequent conveyance by such grantee, without describing such lands by metes and bounds, but by the number or numbers by which the same are designated in the government survey, passes the title, not only to the land originally constituting the grant from the United States, but to the accretions thereto.
4. **Adverse Possession.** No title by adverse possession can be acquired against the state or general government, nor is land the subject of adverse possession while the title is in the state.

APPEAL from the district court for Otoe county: PAUL JESSEN, JUDGE. *Reversed.*

*John C. Watson and John V. Morgan, for appellant.*

*W. F. Moran, contra.*

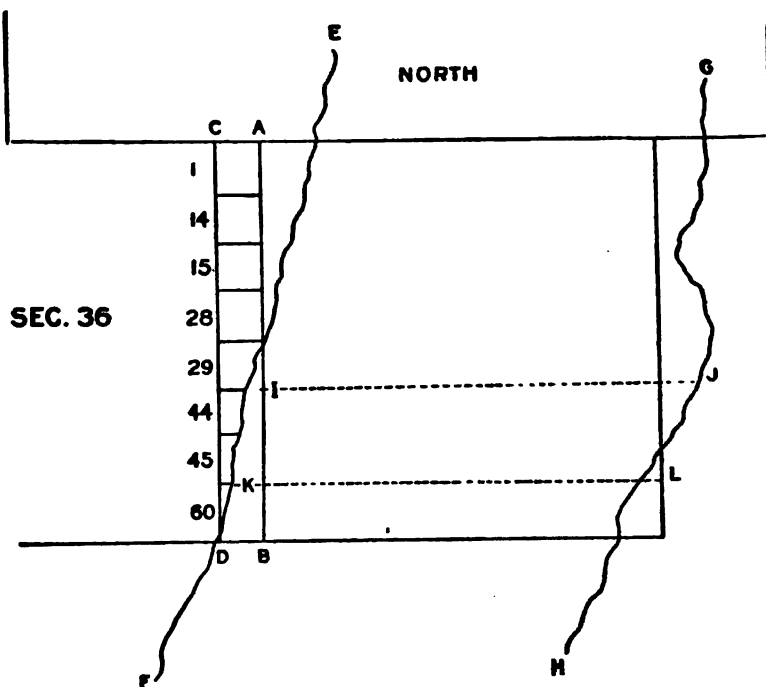
ALBERT, C.

This is a suit in equity, brought to quiet the title to certain real estate. On page 560 is a plat which will, perhaps, assist to a proper understanding of the case.

The line AB represents the eastern boundary of section 36, town 8, range 14 east of the 6th P. M.; the line CD, the

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western boundary of certain lots in said section, which are numbered 1, 14, etc.; the irregular line EF, the right bank of the Missouri river, as it was at the time of the government survey and at the time of the grant to the state hereinafter mentioned. The river gradually receded to the east until some time before 1901, and the right bank is now located as indicated by the irregular line GH. The land in dispute is bounded on the west by the east line of



lots 44 and 45; on the north, by the dotted line IJ; on the east by the right bank of the Missouri river, as now located; on the south, by the dotted line KL. The triangular tract of land lying between the former right bank of the Missouri river and the north half of section 36, and marked M, is what is referred to in the record as lot 1 of section 31, town 8, range 15 east of the 6th P. M. Section 36 was a part of the grant of the United States to the state of

Nebraska, and the state, on the 23d day of September, 1901, sold and conveyed lots 44 and 45 to the defendant. The lots are not described by metes and bounds in such conveyance, but by the respective numbers by which they are designated in the government survey. The plaintiff asserts title, not only to the land in dispute, but to the entire tract lying between the line AB and the present right bank of the river. While she introduced deeds from different parties, purporting to convey to her different portions of this tract, it does not seem that she traces her title to any portion of it to a grant from the United States, but claims exclusively by adverse possession. On the other hand, the defendant contends that the land in dispute is the proportionate share of the accretion resulting from the recession of the river, which belongs to 44 and 45, conveyed to him by the state, and that the title to such share of the accretion passed to him by such conveyance. The trial court found for the plaintiff and entered a decree accordingly. The defendant appeals.

It would appear from the record that the former right bank of the river was in fact the eastern boundary of the south half of section 36, and consequently of lots 44 and 45 of that section, according to the government survey, and at the time of the grant of said section to the state. The state, therefore, became the riparian proprietor to the extent of such boundary. It is well settled that where, as in this case, the water of a river recedes gradually, changing the channel of the stream and leaving the land dry which was theretofore covered by water, such land belongs to the riparian proprietor. *Gill v. Lydick*, 40 Neb. 508; *Wiggenhorn v. Kountz*, 23 Neb. 690; *Lammers v. Nissen*, 4 Neb. 245.

As before intimated, lots 44 and 45 are not described by metes and bounds in the conveyance from the state to the defendant, but by the numbers by which such lots are described in the government field notes. Under such conveyance, the title to such portion of the accretion as attached to those lots passed to the defendant. *Rex v. Yar-*

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*borough*, 3 Barn. & Cr. (Eng.) \*91; *County of St. Clair v. Lovington*, 23 Wall. (U. S.) 46; *Chicago Dock & Canal Co. v. Kinzie*, 93 Ill. 415; *Camden & Atlanta Land Co. v. Lippincott*, 45 N. J. Law, 405; *Lammers v. Nissen*, 4 Neb. 245, 154 U. S. 650.

It may be conceded that the possession of the plaintiff of the land in dispute has been of such a character and for such a period as to have ripened into a title in fee before the commencement of this action, had she been holding adverse to the defendant, or any other person against whom the statute would run during that time. But, so far as appears from the record, the United States and the state of Nebraska were the exclusive owners of the adjacent lands until 1901, when the state conveyed lots 44 and 45 to the defendant. That no title by adverse possession can be acquired against the state or general government is elementary. Land can not be the subject of adverse possession while the title is in the state. *Bagley v. Wallace*, 16 S. & R. (Pa.) 245; *Hall v. Gittings*, 2 Harr. & J. (Md.) 112; *Armstrong v. Morrill*, 14 Wall. (U. S.) 120. It follows, then, that the statute did not begin to run in favor of the plaintiff as to any portion of the accretion until 1901, when the title to lots 44 and 45 passed from the state to the defendant, and then began to run only as to that portion of the accretion attaching to said lots.

The record does not afford sufficient data nor do we deem it necessary to determine what portion of the accretion thus passed to the defendant. That it includes at least a considerable portion of the land in dispute is obvious, under the familiar rules for the apportionment of accretions. The plaintiff has not shown title of any kind to any portion of the land, and therefore the decree quieting her title in the whole is obviously erroneous in any proper view of the case.

It is therefore recommended that the decree of the district court be reversed and the cause remanded for further proceedings according to law.

FAWCETT and GLANVILLE, CC., concur.



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By the Court: For the reasons stated in the foregoing opinion, it is ordered that the judgment of the district court be reversed and the cause remanded for further proceedings according to law.

REVERSED.

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SECOND UNITED PRESBYTERIAN CHURCH, PAWNEE CITY, NEBRASKA, APPELLANT, v. FIRST UNITED PRESBYTERIAN CHURCH, PAWNEE CITY, NEBRASKA, ET AL., APPELLEES.

FILED APRIL 7, 1904. No. 13,534.

1. **WILLS: CONSTRUCTION.** The mere misnomer of a legatee or devisee does not render the gift void, if, from the context of the will or proof *dehors* the instrument, it can be ascertained who was actually intended.
2. ———: **MISNOMER.** Where one claiming as devisee under a will is not designated therein by his proper name, he may show that he is also known by the name used in the will to designate the devisee, although the name of another claimant exactly corresponds to the name thus used.
3. ———: **AMBIGUITY.** In such case there arises a latent ambiguity, which may be removed by evidence of circumstances tending to show which of the two claimants the testator intended as the object of his bounty.
4. **Evidence.** Evidence examined, and held sufficient to sustain the decree of the district court.

APPEAL from the district court for Greeley county:  
JOHN R. THOMPSON, JUDGE. *Affirmed.*

*J. W. Deweese, F. E. Bishop, George W. Scott and S. J. Graham, for appellant.*

*Lindsay & Raper and James R. Hanna, contra.*

ALBERT, C.

In 1870, a religious body was organized in Pawnee City, under the corporate name of the United Presbyterian

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Church of Pawnee City, Nebraska. It is claimed on the one hand, and denied on the other, that the corporate name was changed, in 1881, to the First United Presbyterian Church, etc. In 1887, another religious body was organized in the same city, under the corporate name of the Second Presbyterian Church of Pawnee City, Nebraska. Ecclesiastically, as well as legally, the two organizations were entirely independent of each other, save that they were within the jurisdiction of the same presbytery and synod of the denomination known as the United Presbyterian Church of North America to which they belonged. They will be referred to hereafter as the first and second church, respectively.

David Remick resided in that city from 1870 to 1880, and retained business interests therein and made frequent visits thereto until his death. He died testate in 1901, in the state of California, and his will was duly probated. The devise which gave rise to the present litigation is as follows:

"I will to the United Presbyterian Church of Pawnee City, Nebraska, the following described land in Greeley county, Nebraska, to be managed and expended in a way the trustees of said church may deem best for the welfare of said church." (Here follows a description of the land.)

After the probate of the will, the trustees of the first church conveyed the land in question to the Pawnee City Academy, which is an educational institution of the same denomination. Afterwards, the second church began this action against the Pawnee City Academy and others in the district court for Greeley county, claiming that under said devise it took title to one-half the land mentioned therein, and asked to have its title thereto confirmed. The first church intervened, was made a party defendant, and filed its answer asserting ownership of the land under the will. The court found against the plaintiff and in favor of the intervener. The plaintiff brings the case here on appeal. The controversy here is exclusively between the first and second churches.

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It is claimed on behalf of the second church, that the first church, having changed its name before the will was made, from the United Presbyterian Church to the First United Presbyterian Church, does not bear the name used in the will to designate the devisee, but that the two churches, taken together, constitute a corporate ecclesiastical entity, which corresponds to the name used by the testator to designate the devisee, and that the devise, therefore, goes to such entity, to be apportioned between two congregations constituting the first and second churches.

There is considerable doubt arising from the evidence, whether a change in the corporate name of the first church was legally effected, but it does not appear to be necessary to go into that question; because, whatever steps may have been taken to that end, it is clear that, after such steps were taken, and down to the time of the trial of this case in the district court, the first church continued to be known by the name of the United Presbyterian Church of Pawnee City, Nebraska, under which it was organized, although it was also known by the other name. In 1883, it erected a large church edifice, which was paid for, in part at least, by subscriptions from its members and the public generally. A number of these subscriptions were reduced to notes as late as 1884 and 1885. One of the subscription papers and a number of the notes are in evidence, and in each instance the church is designated by its original name. In 1884, a contract was made for furniture for the new church edifice, and a mortgage for \$5,000 given on the church property. In both of these instruments, as well as in the note for the security of which the mortgage was given, the church is described as the United Presbyterian church. The same is true of a policy of insurance on the church property, issued in 1889. As late as 1887, it appears to have been referred to by one of the newspapers of Pawnee City by its old name. Another significant fact bearing on this point is that, from 1870 down to the present time, the accounts of the church of

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its different funds, in the several banks of Pawnee City, were kept in the name of the United Presbyterian Church of Pawnee City, Nebraska. The testator was president of one of these banks for a number of years immediately preceding his death. It will not be claimed, we think, that it is necessary, in order to sustain a devise to the first church, that it should be designated in the will by the precise name it had adopted.

The rule is thus stated in Schouler, Wills (3d ed.), sec. 583:

"The mere misnomer of a legatee or devisee does not render the gift void, if from the context of the will or proof of the admissible sort *dehors* the instrument it can be ascertained who was actually intended. Persons designated by their nicknames, too, or by words of misdescription originating in some nickname, or by their popular names, or by some familiar term of endearment, may also be identified. So, too, may a name assumed or gained by reputation, though not strictly appropriate, amount to a sufficient description of the person intended. Nor need a legatee be expressly named at all if oral proof of identity serves to connect him with the gift which the will expresses."

The doctrine of the text is familiar, and is supported by a long list of authorities. Assuming, as claimed on behalf of the second church, that the two churches taken together constitute a corporate ecclesiastical entity, corresponding to the name used in the devise and capable of taking thereunder, the most favorable view that can be taken, with respect to the claim of the second church, is that there are two bodies answering to the name used by the testator to designate the object of his bounty, namely, the first church and the "corporate ecclesiastical entity" consisting of the first and second churches. This gives rise to a latent ambiguity. It is elementary that an ambiguity of this character may be removed by any evidence, either of circumstances or declarations of the testator, tending to show which of the two persons answering to the description the testator had in mind when the will was made. Schouler,

Wills (3d ed.), sec. 573. The rule is illustrated and applied in numerous cases collected in 2 Am. & Eng. Ency. Law (2d ed.), 298.

The only question then is, whether the testator, by the use of the name, the United Presbyterian Church of Pawnee City, Nebraska, intended the first church, or had in mind a body consisting of both the first and second churches. The evidence on this point is quite voluminous, and we shall notice only what seems to us to bear most strongly on the question. It sufficiently appears that, during the residence of the testator in Pawnee City, four church organizations were maintained there: (1) The United Presbyterian Church; (2) the First Presbyterian Church; (3) the First Baptist Church, and (4) the First Methodist Church. He was not a member of any of them, but the evidence shows a decided preference on his part for the first. During his residence there, that church was presided over by the Rev. R. J. McCready, whose pastorate continued up to the trial of this case. The testator appears to have held him in high esteem; and between the two men there existed a strong bond of friendship, which was broken only by the death of the former. During his residence in Pawnee City; the testator usually attended the first church, and his daughter was a teacher in its Sunday school. After his removal, on each subsequent return, he visited the Rev. McCready, or the latter, alone or with his family, visited him. The last of these visits appears to have been in 1898 or 1899, and on this occasion the testator made inquiries of the pastor in regard to the church over which he presided, as well as in regard to the other organizations which were in existence during his residence in that place. It does not appear that he made any inquiry in regard to any other church organization, although there were three others at that time. It also sufficiently appears that, after his removal from Pawnee City, he expressed an intention to help the Rev. McCready's church or congregation. In addition to the devise hereinbefore mentioned, the testator made provision by will for

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the First Presbyterian Church, the First Baptist Church and the First Methodist Church, all of Pawnee City. The evidence tends to show grounds for a special interest in each of the three churches just mentioned. They were in existence during his residence in that city. His first wife was a member of one of them; his second wife of another, and a nephew, in whom he took unusual interest and to whom he left a considerable portion of his property, was a member of the third. It was these three churches, and the one presided over by the Rev. McCready, of which he made special inquiry on the occasion of his last visit to Pawnee City, and the names by which these four churches were known and designated during his residence there correspond exactly with the names used in the will to designate the objects of his bounty. Three other churches were organized after his removal from Pawnee City, one of which is what we have heretofore referred to as the second church and the plaintiff in this case. None of them are specifically mentioned in the will, nor any of them referred to in any way, unless it should be held that the second church is included in the devise under consideration. It also appears in evidence that the second church was organized as a result of some difference between the members of the first church, the dissatisfied members withdrawing and organizing the second church. The evidence shows that the testator was aware of this division, and disapproved of the organization of the second church. There is nothing in the record to show that he ever expressed any intention to assist it, or that he took any special interest in it, save that on one occasion he attended one of its services. Taking into account all the circumstances—the interest the testator manifested in the first church, the strong friendship that existed between him and the reverend gentleman who was its pastor for so many years, that the first church and the three other churches in Pawnee City mentioned in the will were associated in his mind with his life and business career in Pawnee City—the evidence seems amply sufficient, if not

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conclusive, that the testator, in the use of the name, the United Presbyterian Church of Pawnee City, Nebraska, had in mind the first church and no other.

Our attention is called to another provision of the will, whereby certain property was left "to the trustees of the United Presbyterian Church of Hepburn, Page county, Iowa, for the benefit of such church (said church now being presided over by Rev. D. Dodds) and to the trustees of the United Presbyterian Church, in Page county, Iowa, to be disposed of as the trustees of said church think best for the benefit of said church." The evidence shows that the United Presbyterian denomination had six or seven congregations or churches in Page county, Iowa, at the time the will was made, one of which was presided over by Rev. D. Dodds. It is argued that as the testator was so specific in his description of the church in Hepburn, going to the extent of naming its pastor, he would have been equally specific in designating the first church in the devise under consideration, had he intended it as the devisee. That simply goes to the sufficiency of the evidence to sustain a finding that the first church was the object the testator had in mind when he used the name, the United Presbyterian Church, etc.; and, to our minds, it is wholly insufficient to rebut the inference to be drawn from the facts hereinbefore stated. It is not unusual for a person to exercise the greatest precaution, or to express himself with the highest degree of accuracy up to a certain point, and then relax his vigilance. It is not always easy for the person himself to explain how this happens. In the present instance, it is probable that, when the testator called to mind the intended objects of his bounty, the names by which he had known the churches in Pawnee City during his residence there came to him with all the strength of early impressions, leaving no room for doubt, in his mind, as to the exact names by which they should be designated in the will.

We are thoroughly satisfied that the decree of the district court is in accordance with the intention of the tes-

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tator, which, after all, is the chief thing to be considered in determining the construction to be put on a will. It is therefore recommended that the decree of the district court be affirmed.

FAWCETT and GLANVILLE, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the decree of the district court is

AFFIRMED.

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WILLIAM A. GORDON V. CITY OF OMAHA.

FILED APRIL 7, 1904. No. 13,387.

1. **CITIES: ACTION.** A public officer who has by mandamus compelled the payment of the principal of his salary, can not afterwards maintain an action at law against the municipality out of whose funds such salary is payable to recover interest thereon.
2. ———: **DAMAGES.** Damages are not recoverable against a metropolitan city of Nebraska because of delay or neglect of its mayor and council in the performance of a ministerial duty.

**ERROR** to the district court for Douglas county: **WILLARD W. SLABAUGH, JUDGE.** *Affirmed.*

*J. W. Eller*, for plaintiff in error.

*C. C. Wright* and *W. H. Herdman*, *contra.*

GLANVILLE, C.

This case was tried in district court upon appeal from the action of the city council of the city of Omaha in disallowing a claim filed by the plaintiff in error, as assignee of Samuel I. Gordon, against such city for certain amounts of interest claimed to be due because of delay in the payment of the salary of his assignor as police judge of that city. Payment of the principal of such salary was secured by plaintiff's assignor by means of writs of mandamus



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issued to the mayor and council of said city, in which they were required as ministerial officers to perform the acts necessary to the payment of such salary. The writs were sought and issued requiring the payment of a specific amount, being the principal only of such salary, and no mention of interest thereon was made in those actions. We are fully satisfied that the plaintiff's assignor could not split his cause of action and secure the payment of the principal in one form of action, and afterwards, by himself or his assignee, resort to another form to secure the payment of interest. Again, we are satisfied that a municipal corporation is not responsible in damages to one injured by the failure of its officers to perform a ministerial duty expressly placed upon such officers by law. To allow the plaintiff's action for interest for the time of the delay in the payment of his salary, would be to give him damages against the city because of the failure of its public officers to perform an act enjoined by law upon them, stipulated in this case to have been a ministerial duty. Such damages, if recoverable at all, can only be recovered from such officers and their sureties upon their official bonds.

The judgment of the trial court upon the pleadings and stipulated facts, wherein it dismissed plaintiff's action, is right and should be affirmed. We therefore recommend that it be affirmed.

FAWCETT and ALBERT, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is

**AFFIRMED.**

## WESTERN MATTRESS COMPANY V. JENS OSTERGAARD.\*

FILED APRIL 7, 1904. No. 13,518.

1. **Action for Damages: CONTRIBUTORY NEGLIGENCE.** If a servant's injury is the direct result of his own disobedience of orders given by one in charge of the work in which he is engaged, he is guilty of contributory negligence and is not entitled to recover therefor.
2. **Trial: QUESTION FOR JURY.** When there is evidence tending to show that an employee disobeyed the orders of his superior, and that obedience to the order would have avoided the injury of which he complains, the question of whether the orders were given should be submitted to the jury.

ERROR to the district court for Lancaster county: LINCOLN FROST, JUDGE. *Reversed.*

*T. J. Doyle and Strode & Strode, for plaintiff in error.*

*Frederick Shepherd, contra.*

DUFFIE, C.

Plaintiff in error is engaged in the manufacture of iron bedsteads at the city of Lincoln. Ostergaard, an employee, was injured in the defendant's foundry by molten metal, which flew from a chill or mould and struck him in the left eye. It appears from the evidence that the foundry is provided with a number of benches, where the hands "assemble" or place the rods and other parts of the bed in a frame attached thereto in such manner as, when bound together, to make a completed head or foot piece of the bed. The frame is also supplied with moulds or chills at proper places, and into these, after the rods and parts have been assembled and the frame unlocked, one of the employees pours molten metal through spew holes opening thereon. By this means the rods or parts are molded and bound together and, after the molten metal has cooled, the workmen unlock the frame and take out the completed head or foot piece of the bed. There are two dangers accompanying this process. One from some of the molten

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\* Rehearing allowed. See opinion, p. 575, *post*.

metal dropping upon the ground and "popping" or throwing off minute particles of the metal. This popping from the ground does not usually arise higher than a man's knees or waist. The other danger arises from the rod upon which the molten metal is poured being damp or rusted, in which case the popping comes from the mould or chill, and the face and eyes of the workmen are endangered thereby. To guard against injury from the last mentioned cause, the company usually furnished each of its employees, upon their entering its service, with a notice reading as follows: "Notice to men entering the employ of the Western Mattress Company in the iron bed department: You are requested to bring a two pound blacksmith's hammer and a pair of glasses. These glasses are to protect your eyes from injury, and, while not compulsory on your part to wear them, still we advise you to take this precaution. The best pair of glasses can be made by buying what are commonly called 'goggles,' being composed of a light screen work of wire with glass in front; the glass should be removed and mica or, as it is often called, 'isinglass' substituted. This makes a pair of glasses that will not break and which, if struck by a hot iron, will not be destroyed or burned in any way. The gauze or iron part of these glasses extends away from the eye, giving ample ventilation, so there will be no difficulty from sweating around the eyes, as there would be from ordinary glasses." By some oversight the company neglected to give this notice to the defendant in error when he entered its employ. Within two or three days after commencing work he was engaged in filling the frame with the iron rods, and was standing near thereby when the "pourer" filled the moulds or chills with molten metal, and what is denominated a "pot" came from the chill, throwing a piece of the hot iron into his eye, from which he suffered great pain, and the sight, while not destroyed, is injured to a considerable extent. The negligence charged is the failure to provide him with goggles or to notify him of the danger attending his work. A trial resulted in a verdict

for the defendant in error and, judgment having been entered thereon, the case is brought here for review.

Many exceptions are taken to the instructions given by the court, and to the refusal of the court to give those asked by the plaintiff in error. We do not think that it is necessary to review all the questions made, as the case, in our opinion, will have to be reversed upon the refusal of the court to give the tenth instruction requested by plaintiff in error. This instruction is as follows:

"If the jury find from the evidence that defendant's foreman instructed the plaintiff to stand behind him (the foreman), and turn his face in the opposite direction from the chills into which molten metal was being poured at the time of the accident, and if the plaintiff did not obey such instructions, but stood with his face in the direction of the chills into which molten metal was being poured at the time of the accident, then he can not recover in this action."

Roy Redding was foreman of the company at the time the accident occurred, and the party who poured the molten metal into the moulds or chills. He testified that he directed Ostergaard to stand back behind him, and to turn his back to the mould or chill while the metal was being poured. The evidence is uncontradicted that Ostergaard stood facing the mould or chill at the time he received the injury. It is apparent that, if he had obeyed the instructions of the foreman and turned his back to the moulds, the injury to his eye would not have happened. Whether such instructions were given him or not was a question for the jury, and plaintiff in error had the right to have that question submitted to the jury, and to take their judgment upon any conflicting evidence relating to the giving of such instructions. The law is plain that, if the servant's injury is the direct result of his own disobedience of orders, he is guilty of contributory negligence and can not recover on that account. We have examined the instructions with care, and we find nothing in them that is the equivalent of the tenth instruction asked by the plaintiff in error, or

calls the attention of the jury to this theory of the case. We think there was error in the refusal of the court to give this instruction or one covering the point raised, and we therefore recommend a reversal of the judgment.

LETTON and KIRKPATRICK, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is

REVERSED.

The following opinion on rehearing was filed November 16, 1904. *Judgment of reversal adhered to:*

1. **Trial: INSTRUCTIONS.** When a special request is made for an instruction which fairly reflects either a meritorious cause of action or ground of defense, the court should either give the instruction requested or substitute another in its stead which embodies the same principal.
2. **Negligence: INSTRUCTION.** When an allegation of negligence is unsupported by any competent testimony, it should not be given in an instruction to the jury.

OLDHAM, C.

The original opinion in this case was announced by DUFFIE, C., *ante*, p. 572. The issues are fully and fairly stated in the opinion and need not be again set out. A rehearing was granted for a further examination of the conclusion reached. It is held in the opinion that the judgment of the district court was erroneous, in refusing to submit to the jury the question as to whether plaintiff was injured while disobeying an instruction given him by the foreman of defendant, who, for that purpose, stood in the place of the master. One of the defenses relied upon and supported by the testimony of defendant's foreman was that, when plaintiff was employed, he was directed by the foreman to turn his back to the foreman when the moulds were being filled with molten metal. While this direction was denied by plaintiff, the testimony on this

for the defendant in error and, judgment having been entered thereon, the case is brought here for review.

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"If the jury find from the evidence that defendant's foreman instructed the plaintiff to stand behind him (the foreman), and turn his face in the opposite direction from the chills into which molten metal was being poured at the time of the accident, and if the plaintiff did not obey such instructions, but stood with his face in the direction of the chills into which molten metal was being poured at the time of the accident, then he can not recover in this action."

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calls the attention of the jury to this theory of the case. We think there was error in the refusal of the court to give this instruction or one covering the point raised, and we therefore recommend a reversal of the judgment.

LETTON and KIRKPATRICK, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is

REVERSED.

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issue raised a question of fact on a meritorious defense, which should have been submitted in a proper instruction. It is not necessary to determine whether the instruction requested was the best that could have been compiled; it is sufficient to say that it fairly called the attention of the trial court to one of the defenses relied upon, and that either the instruction requested, or a better one embodying the same principle, should have been given. In fact, it is probably the duty of the trial court, without a request, to embody in the instructions to the jury every meritorious cause of action or ground of defense raised by the pleadings and supported by competent evidence. But, in any event, when a special request is made for an instruction which fairly reflects either a meritorious cause of action or ground of defense, the court should either give the instruction requested or substitute another in its stead which embodies the same principle.

While, as above indicated, the defendant introduced testimony tending to show that the injury was occasioned by plaintiff disobeying the orders of his foreman in not turning his back when the chills were being filled, yet, even under defendant's testimony, there is a serious doubt as to whether plaintiff might not have been misled by another direction given him by the foreman, to the effect that, if he (the plaintiff) stood behind the foreman when the metal was poured into the chills, he could not be hurt. But, in any event, the question as to whether plaintiff was properly instructed in such a manner as to fully warn him of his danger and whether he obeyed or disobeyed the instruction so given, was a question raised by the pleadings on which there was conflicting evidence and, as a correct verdict depended on this issue, it should have been given in a proper instruction to the jury; and as, for this reason, a new trial will be necessary, we would suggest that the learned trial judge give a new set of instructions to the jury, confined strictly to the questions in issue, and not submitting any question unsupported by any testimony, as was done in the 5th and 6th paragraphs of instructions



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given on its own motion at the former trial. These instructions submitted the alleged negligence of the defendant in not providing a shield or guard over the frame to prevent the heated metal from flying out. While negligence is alleged in the petition because of this failure, yet the testimony wholly fails to support this allegation of the petition, and, being wholly unsupported by competent evidence, it should not have been submitted to the consideration of the jury.

We therefore recommend that the former judgment of this court be adhered to.

AMES and LETTON, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the former judgment of this court is adhered to.

REVERSED.

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HENRY DU BOIS V. ANN MARTIN, APPELLEE, ET AL., IM-  
PLEADED WITH SAMUEL C. COLT, APPELLANT.

FILED APRIL 7, 1904. No. 13,420.

**Foreclosure: DOWER: STATUTE OF LIMITATIONS.** A mortgagee obtained a decree of foreclosure in the year 1877, the proceeds of the sale being distributed among various lienholders according to their priority, leaving a balance insufficient to satisfy the lien of the mortgage. The question of the dower interest of the mortgagor's wife was presented in the foreclosure suit, but there was no adjudication thereof in the decree. She was made a party and served with summons, but made no appearance in the suit. In 1901, the mortgagee filed a supplemental cross-petition in the foreclosure suit, serving summons upon the mortgagor's wife, and asking that she be decreed to pay him the balance due on his mortgage, or be barred of her dower right. *Held*, That the attempted proceedings were barred by the statute of limitations.

**ERROR to the district court for Lancaster county: EDWARD P. HOLMES, JUDGE. Affirmed.**

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*Ricketts & Ricketts*, for appellant.

*Strode & Strode and Guy A. Anderson*, contra.

KIRKPATRICK, C.

It is disclosed by the record in this case that one O. J. Martin was the owner of certain land in Lancaster county, Nebraska; and of this land the S.  $\frac{1}{2}$  of the N. W.  $\frac{1}{4}$  of section 28, township 12, range 6, involved in this controversy was a part. Ann Martin, appellee, was the wife of O. J. Martin. On April 15, 1874, one Seeley Y. Mason recovered a judgment against O. J. Martin for the sum of \$450.88, and on November 2, 1874, Martin and his wife executed a mortgage upon the premises to appellant, Samuel C. Colt, for \$1,272. Some time later O. J. Martin seems to have executed a second mortgage upon the premises to one Henry Du Bois; and on August 19, 1876, Du Bois brought a suit of foreclosure, and made Mason, the judgment creditor, and Samuel C. Colt, appellant, parties defendant. Colt filed an answer and cross-petition, making Ann Martin, appellee, a party defendant, and legal service of summons seems to have been made upon her. Seeley Y. Mason answered, setting up his judgment, which antedated all the mortgages, and alleged that he had levied upon the land in controversy in the case at bar under an execution issued upon his judgment, and had sold the land, bidding it in himself, prior to the commencement of the foreclosure proceedings. This cause was referred to a referee to return findings of fact and conclusions of law, which was done; and, subsequently, in 1877, a decree of foreclosure was entered on the report of the referee, fixing the amount of the liens, and determining the priorities of the various parties. Ann Martin, appellee, seems to have made default in the foreclosure proceedings, but the decree was silent as to her dower interest, and the land in controversy was omitted from the decree and order of sale. After satisfying the prior liens from the proceeds of

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the sale, there remained to apply on the decree of appellant, Colt, the sum of \$515.30, which would leave a balance due him of \$756.68. No further payment seems ever to have been made by Martin upon this indebtedness. In 1893 O. J. Martin died, leaving surviving him appellee, his widow. On September 12, 1901, appellant Colt filed in the old case of *Du Bois v. Martin*, in which the proceedings hereinafter referred to were had, a pleading which he styled a supplemental cross-petition, in which he sets out the transactions substantially as hereinbefore narrated, and prayed for a decree, that, on the failure of Ann Martin to pay the balance due on his decree within a time to be fixed by the court, her dower interest in the premises might be sold for the satisfaction thereof. To this supplemental cross-petition, appellee answered, setting up the foreclosure of appellant's mortgage in the proceedings mentioned; that no mistake had been made in the entry of the decree; that no proceedings had ever been taken to correct, modify or appeal from it, and that it had become final; and that the mortgage was wholly barred by the statute. To this answer was filed, for reply, a general denial. Trial was had, which resulted in a finding that the mortgage of appellant was barred by the statute of limitations, and judgment dismissing the supplemental cross-petition. The correctness of this judgment, so entered, is presented in this appeal.

It is contended on behalf of appellant that, inasmuch as the pleadings in the first foreclosure case presented the question of the dower right of appellee in the real estate in controversy herein, and no action was taken by the court in that case upon this question, therefore, the effect was to leave the question of dower right an undetermined and pending question, and that, as such, it could be brought to the attention of the trial court at any time, and, it being a pending case, the statute of limitations would not run. We are not disposed to question the correctness of the decisions, cited by appellant, in cases where the facts were such as to warrant the application of the principle con-

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tended for; but, in the view we take of the facts of this case, these decisions have no application. The answer and cross-petition of appellant Colt having presented an issue of the dower right of appellee, we are of opinion that it must be conclusively presumed to have been adjudicated. If appellant neglected to obtain all the relief to which he was entitled under his mortgage, it was due to his own neglect, and we are of opinion that he can not now be heard to complain.

A decree was entered in the case, a sale was had, and the proceeds were distributed, a portion of which was paid to appellant. The case was closed up, and we do not see upon what principle it could ever again be considered as a pending cause. The fact that appellant filed a supplemental cross-petition, and caused new service to be made upon appellee, would seem to indicate that appellant himself regarded his action as the commencement of a new proceeding. We are of opinion that appellant, having failed in the first proceeding to insist upon his lien upon all the land covered by his mortgage, is in the same position he would occupy had he made proof but for half the amount actually due him at the time. It would hardly be contended that he could now come in, at the end of nearly 25 years, and have a decree for the remainder. The only right of action appellant has must arise out of his mortgage, and all rights thereunder having become fully barred by the statute, there can be no recovery. The judgment of the trial court in dismissing the cross-petition of appellant seems to be right, and it is recommended that it be affirmed.

DUFFIE and LETTON, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is

**AFFIRMED.**

C. D. SMILEY ET AL., APPELLEES, v. SIOUX BEET SYRUP COMPANY ET AL., APPELLEES, ABEL ANDERSON, TRUSTEE, INTERVENER, APPELLANT.\*

FILED APRIL 7, 1904. No. 13,564.

**Corporation:** RECEIVER: **PARTIES:** LIENS: PRIORITIES. A corporation issued bonds in the sum of \$35,000, to secure which it executed a mortgage in the name of a trustee. Bonds to the extent of \$17,000 were disposed of, the proceeds being applied to the satisfaction of the corporation's indebtedness. Subsequently, a stockholder on behalf of himself and all the other stockholders made application to the court for the appointment of a receiver, no notice of such application being served upon either the trustee or any of the bondholders, who were not made parties to the proceedings. *Held*, That the receiver's certificates issued for expenses incident to the receivership were not a lien superior to that of the mortgage.

APPEAL from the district court for Dakota county: GUY T. GRAVES, JUDGE. *Reversed*.

A. L. Beardsley, for appellant.

*Shull & Farnsworth and R. E. Evans, contra.*

KIRKPATRICK, C.

This cause is brought to this court upon appeal from a judgment of the district court for Dakota county. In order to obtain a correct understanding of the questions presented, it will be necessary to state briefly the history of the proceedings leading up to the judgment presented for review. Prior to December 23, 1903, the Sioux Beet Syrup Company was a duly incorporated company, having its place of business in Dakota county. On that date, one C. D. Smiley, a stockholder of the corporation, on behalf of himself and all the other stockholders, filed a petition in the district court, asking the appointment of Andrew J. Cramper as receiver of the corporation. A waiver of notice of the application and a certified copy of

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\* Rehearing allowed. See opinion, p. 586, *post*.

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the minutes of the stockholders' meeting held December 22, 1902, showing a request that a receiver be appointed, and that Andrew J. Cramper be named as such receiver, were filed by the corporation. Acting on this application and the consent of the corporation, a receiver was appointed on the 24th day of December, 1902. The receiver gave bond and took charge of the corporation. On December 4, 1902, about 20 days before the receiver was appointed, the corporation executed a mortgage upon all of its property to secure its bonds which were to be issued in the sum of \$35,000. In the mortgage given to secure these bonds, Abel Anderson, appellant herein, was named as trustee. Of the \$35,000 in bonds provided for, about \$17,000 were issued and disposed of, and the proceeds realized therefrom applied upon the indebtedness of the corporation. None of the bondholders were made parties to the proceedings for the appointment of a receiver. On January 3, 1903, Smiley, plaintiff in the receivership proceedings, served notice on Anderson, trustee for the bondholders and appellant herein, that on January 12, 1903, he would apply to the district judge, at Pender, in Dakota county, for an order permitting the receiver to issue receiver's certificates, which should be a lien superior to the mortgage. Anderson, trustee, appeared specially and challenged the jurisdiction of the court, and objected to the issuance of the receiver's certificates upon various grounds. On January 12, the day set for the hearing, these objections were overruled, and the receiver was authorized to issue certificates in the sum of \$2,500 which should be a lien upon the property of the corporation, superior to the mortgage. No further steps seem ever to have been taken under the receivership as it then existed, but on February 17, 1903, Smiley, the plaintiff, served a second notice on the corporation that, on February 23, he would apply for the appointment of a receiver. He thereupon filed a motion based on the petition filed in the first instance, asking that a receiver be appointed, and on the day fixed for the hearing Andrew J. Cramper was appointed receiver. Neither

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the trustee nor any other person representing the mortgage were made parties to this last proceeding, nor was any notice served upon the trustee or the bondholders. On July 1, 1903, the receiver filed his final report, showing his transactions, the sale and disposition of a large amount of the property of the corporation, and the incurring of a large amount of indebtedness for the protection of the corporation property, attorneys' fees, court costs, etc.; and showing that he had issued receiver's certificates in the sum of \$2,307.31, which he asked to have made liens upon the property superior to the mortgage. Thereupon, appellant Anderson, by leave of court, filed a petition of intervention, setting up the mortgage; the amount of bonds which had been sold; that he had had no notice of the application for a receiver; that the petition upon which the receiver was appointed failed to state a cause of action, and that the receivership proceedings were void and of no effect as affecting the lien of the mortgage, for want of notice. No answer was filed to this petition of intervention. On the next day, July 2, a trial was had on the issues presented by the petition of intervention, resulting in a judgment approving the final report of the receiver, ordering his discharge, and adjudging that the receiver's certificates, amounting to \$2,307.31, were valid liens upon the property of the corporation superior to the lien of the mortgage; and the correctness of this judgment of the trial court is presented for determination by this proceeding.

It is contended on the part of appellant: First, that the petition for the appointment of a receiver did not state facts authorizing the court to make such appointment and, therefore, the appointment was void; second, that the holders of the bonds of the corporation were not made parties to the proceedings, and had no notice of the application for the appointment of a receiver, and, therefore, their interests could not be affected by such proceedings; third, that in no event could the rights of the bondholders be made subject to the receiver's certificates, even though the receiver had been regularly and lawfully appointed. These

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questions, so far as necessary, will be considered in the order stated.

Touching the first contention, the petition shows that plaintiff is a stockholder; that the manufacturing plant belonging to the corporation is worth \$65,000; that there is on hand belonging to the corporation something like \$10,000 worth of merchandise; that a mortgage for \$35,000 had been executed, and \$17,000 worth of the bonds had been disposed of; that the proceeds of the bonds sold had been applied to the satisfaction of the debts of the corporation; that the corporation was indebted to some further amount, the exact amount not being disclosed; that the plant was insured for \$45,000, and that to keep the insurance valid, the plant must be either operated or cared for; that the corporation had under contract a large amount of beets, and a large amount of syrup on hand that would perish unless taken care of; that some of the officers had abandoned the corporation, and the stockholders did not seem to be able to get any one to conduct the business, and at the meeting of the stockholders it was determined to be for the best interest of the corporation to apply for a receiver. It clearly appeared that the corporation was not insolvent, and that there was no disagreement of any kind among the stockholders. About all that did appear from the face of the petition was an apparent want of capacity on the part of the stockholders and officers to manage the business of the corporation. This does not present such a condition of affairs as would authorize a court of equity to appoint a receiver. There were no adversary proceedings pending. The stockholders, at their meeting, seem to have unanimously agreed that it would be a good thing to appoint a receiver, and they selected appellee Smiley as a proper person to make the application. The courts of the state are not constituted and maintained at public expense for the purpose of conducting the business of private corporations, and mere incapacity of stockholders or officers of a corporation to manage its business in a successful manner is not enough to authorize the courts to take charge of such business.



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In the case of *Jones v. Bank*, 10 Colo. 464, 17 Pac. 272, it was said: "To hold that courts of equity can entertain jurisdiction to appoint a receiver of property as the substantive ground and ultimate object and purpose of the suit, on the petition of the owner of the property to be controlled and protected, would be to make them the administrators of every estate where the owners thereof were incapable or unwilling to administer them themselves."

It is very clear, therefore, that the petition failed to state facts sufficient to entitle plaintiff to the appointment of a receiver. But that question is not presented for review in this case, and appellant was not a party to such proceedings. Whether the action of the court in the appointment of a receiver was absolutely void and subject to collateral attack, such as that made in this case, is altogether another question, and one which we think is not necessary to a correct determination of the question presented by the record.

The second contention is that the bondholders were not made parties to the proceedings for the appointment of a receiver, and that, for this reason, their rights can not be prejudiced by anything the receiver did. This proposition seems to be sustained upon authority. Section 273 of the code provides: "Every receiver shall be considered the receiver of any party to the suit, and no others." The bondholders represented by appellant in this case were not parties to this suit, and, clearly, under the statute quoted, the receiver appointed by the court was not their receiver. If he was not the receiver for the bondholders, it is difficult to see how their rights can be affected by what he did. They were in no way responsible for his appointment. They could not procure orders from the court directing the manner in which he should perform his duties, and it is clear their mortgage lien can not be made subject to his expenditures, not made at their instance and not incurred in any case in which they were parties. No notice was served upon them as required by the provisions of section 274 of the code, and we are of opinion that the order ap-

pointing the receiver and all proceedings had thereafter are void, as affecting the rights of appellant and the bondholders whom he represents.

Having reached a conclusion which disposes of the case, the question presented by the third contention of appellant need not be considered. It is therefore recommended that the judgment of the district court, allowing the report of the receiver and making his certificates a lien upon the property of the corporation superior to that of appellant as trustee of the bondholders, be reversed and set aside, and the cause remanded for further proceedings according to law.

DUFFIE and LETTON, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court, allowing the report of the receiver and making his certificates liens superior to the mortgage, is reversed, and the cause remanded for further proceedings in accordance with law.

REVERSED.

The following opinion on rehearing was filed November 2, 1904. *Judgment of reversal adhered to:*

1. **Petition: SUFFICIENCY.** The question of whether a petition states a cause of action may be raised at any stage of the proceedings, up to the submission of the cause in this court upon appeal.
2. **Receiver: APPOINTMENT.** The appointment of a receiver in an equitable action is ordinarily an ancillary remedy, provisional in character, and incidental to the main object or purpose of the suit. *Vila v. Grand Island Electric Light, Ice & Cold Storage Co.*, 68 Neb. 233, followed.
3. **Petition Insufficient.** Petition in case at bar examined, and *held* not to state facts sufficient to authorize the court to appoint a receiver to care for, preserve and manage the property of the defendant corporation.

LETTON, C.

The facts in this case are set forth in the former opinion by Mr. Commissioner KIRKPATRICK, *ante*, p. 581. The

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principal point argued upon the rehearing was that the original petition in this action, asking for the appointment of a receiver, stated facts sufficient to justify the court in the appointment of the receiver. The substance of the petition is set forth in the former opinion, but, in the re-examination of this question, we believe it proper to set forth more fully the substance of the petition, with the view of ascertaining whether it sets forth sufficient facts to justify the appointment of the receiver. It is alleged that the defendant is a corporation, doing business in South Sioux City, Nebraska; that the plaintiffs, with many others, subscribed for stock in said corporation to the amount of \$14,000; that Henry Haubens, William Peterson and Frank Burness became stockholders in said corporation and were instrumental in its organization, and did undertake to and did construct a building and machinery for said company that cost about \$65,000; that the plant was placed in operation in the early fall of 1902 and operated until about the 14th day of December, 1902, when the same was closed; that it has on hand merchandise to the value of \$3,000 or \$4,000, and several thousand dollars' worth of beets, and, unless the beets are manufactured into syrup within the next 90 days, the same will be lost; that it has been demonstrated that the enterprise is a successful one and, if properly managed, the property is of great value, but, unless properly managed, all of the money expended by the plaintiffs will be lost and the property of the company be of no value.

Second. That the management of the company has been under the charge of Henry Haubens and William Peterson; that neither the plaintiff nor any of the stockholders have been able to obtain any correct statement of the affairs of the company from said managers; that, in December, 1902, a stockholders' meeting was held, and the officers of defendant were authorized to issue bonds to the amount of \$35,000, for the purpose of paying off existing indebtedness and furnishing the company with sufficient capital to place its product upon the market; and it was

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agreed by the stockholders and officers that, of the proceeds of the bonds, \$12,000 were to be applied to the payment of the mortgage of \$15,000 on the property, held by Abel Anderson or the Northwestern National Bank of Sioux City, Iowa; that open accounts to the amount of \$8,000 were to be paid from the proceeds, and the balance was to be placed in the treasury for operating expenses; that the bonds and mortgage were executed and placed in the hands of Abel Anderson, who was made trustee in the trust deed, and who was also the treasurer of the defendant company; that one Bradshaw paid \$5,000 to Abel Anderson and received 5 of the bonds; that, by agreement with Anderson, the \$5,000 were to remain to the credit of the company for the purpose of paying laborers and other pressing demands; that, in violation of the agreement, Anderson applied the same to the satisfaction of balances due Anderson or the Northwestern National Bank of which he is president, and did thereby deprive the company of all its funds and ability to continue its business, and did so embarrass the company that it has been unable to make further sale of its bonds or, in any other way, raise sufficient funds to continue its business; and that, by reason thereof, the company and these plaintiffs, as stockholders, are threatened with the loss of all their merchandise, property and money, and that the machinery in said plant is threatened with destruction by freezing of pipes; and that the insurance requires the operation of the plant, to the extent of keeping fires in cold weather so the pipes may be filled with water at all times, and that, unless the company can purchase coal and keep the fires going, the insurance will be canceled.

Third. That, about the 17th day of December, 1902, Henry Haubens, as president of the defendant company, resigned, and that William Peterson, who has been in active management for defendant company, has abandoned said company and is giving the same no attention. That a large number of creditors are threatening to commence attachment proceedings and other litigation and, by rea-

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son thereof, all the property of the company is threatened with destruction and loss, and, unless a receiver is appointed to take charge of said company, these plaintiffs and other stockholders will lose the said property.

Fourth. At a meeting held on December 22, 1902, by the stockholders, it was resolved that a receiver of defendant company should be applied for.

Prayer. Petitioners pray that Andrew J. Cramper be appointed receiver of defendant company and its property with authority, under direction of the court, to take charge of all said property; operate said plant, if deemed advisable and found possible so to do; to employ expert accountants for the purpose of ascertaining the financial condition of said company; to employ counsel to do each and every act necessary in the proper management and preservation of said defendant company's property and its affairs; and to have all the powers and authority usually vested in a receiver, and for such other and further relief as may be deemed equitable in the premises.

It was urged upon the argument that, where the directors of a corporation have been guilty of fraud and mismanagement, a court of equity had the power, at the instance of a stockholder, to appoint a receiver for the affairs of the corporation but this argument was entirely foreign to the case made by the petition. The petition charges no fraud or mismanagement on the part of any directors of the corporation. It states that the president has resigned; that the manager has abandoned the plant; and that the treasurer paid certain debts of the corporation to a banking institution of which he was president with part of the company's assets; but it nowhere charges or asserts that the governing body of the corporation is not in possession of the property nor able to carry on its business. It is true it alleges the corporation is short of funds, and perhaps the true reason why the plaintiff desired the appointment of a receiver is to be found in the allegation that a large number of creditors are threatening to commence attachment proceedings and other litigation, etc.; but this

is no ground for the appointment of a receiver. If the attorney for the plaintiff had been as prolific of charges of fraud and mismanagement by the officers of the company in his petition as he has been in his briefs, he would be in a better position to claim the relief he asks.

A court of equity has no power to appoint a receiver for a solvent concern, for the purpose of preventing its creditors from maintaining actions against it for the recovery of their debts; and, under the facts alleged as to assets, the value of the property largely exceeded the debts. Further than this, the petition seeks no relief beyond the mere appointment of a receiver to care for, manage and control the property and business of the company. Proceedings for the appointment of a receiver in a court of equity are usually ancillary in nature, and the appointment is only granted as an incident to the relief sought in the petition. It is analogous to an attachment proceeding in an action at law, in so far as being dependent upon the main action. In a recent case in this court, *Vila v. Grand Island Electric Light, Ice & Cold Storage Co.*, 68 Neb. 233, this question has been fully discussed by HOLCOMB, J., and the principles fully and clearly stated. But in the petition it is not alleged that the directors of the corporation are not entirely able and willing to carry on its business, nor that any dissension or trouble exists among them. The relief sought amounts, practically, to a removal by the court of the officers of the corporation and the installation by the court itself of its officer, the receiver, as the manager of the corporate affairs. We know of no such power residing in the court under the facts recited in the petition.

A receiver was appointed under this petition and, on the 3d of January, 1903, Abel Anderson, trustee, was served with a notice that the receiver would apply to the district court for orders authorizing him to issue receiver's certificates, as first liens upon the property of the defendant company, for the necessary expenses of preserving the property and placing its product upon the market. Pursuant to this notice, Anderson appeared specially and ob-

jected to the granting of any order making any charges of the receivership a lien prior to the mortgage, among other matters alleging that the petition did not state facts sufficient to empower the court to appoint a receiver, and therefore the receivership is void. The cause was heard on the 12th of January, at chambers, and the objections overruled. On February 17 another summons was issued in the case and served upon Fred Miller, the president of the defendant company, together with a notice of application for the appointment of a receiver, but no new petition appears to have been filed. Following the service of these papers, on the 23d day of February, another order was made in the district court appointing Cramper receiver. If Cramper was already receiver, the object of this second order is not obvious. On the first day of July, 1903, a report of the receiver was filed, with exhibits showing the receipts and disbursements from December 24 to June 1; a list of receiver's certificates issued and accounts for services rendered by attorneys to the receiver; and, on the same day, there was filed by Abel Anderson, trustee, intervener, what he terms an intervention by leave of court, in which he alleges the execution of the mortgage, its recording, that \$18,500 of the debt are due and unpaid, that he was not a party to the application for a receiver, and had no notice of the same; that the petition for such appointment does not state facts which entitle the plaintiff to the relief demanded; and asks that the receivership and the costs thereof be decreed to be junior and inferior to the plaintiff's rights. A hearing was had upon the intervention and objections, the objections were overruled, the report of the receiver confirmed and allowed, and the amount evidenced by the receiver's certificates decreed to be first liens upon the property of the corporation superior to the lien of the bonds and mortgage.

It is contended that Anderson appeared at the time that the order allowing the receiver to issue certificates was made; that he did not appeal from the same and, therefore, the order allowing them to be issued was final as to

him. It will be observed, however, that the order then made allowing the receiver to issue certificates was merely interlocutory in its nature, and was not a final order in the cause from which appeal or error might be taken.

It is further argued that the order appointing the receiver is not subject to collateral attack, but the attack made by Anderson in his intervention is not a collateral attack. He had an interest in the subject matter, and came into court as a party to the action when he intervened and filed his objections seeking to challenge the jurisdiction of the court. The rule is settled in this state that the question of the sufficiency of a petition and whether it states a cause of action may be raised at any step of the proceedings, hence, Anderson was not too late, the trial court was entitled to consider and pass upon the question of jurisdiction, and this court, also, is entitled to pass upon the same question upon appeal. The petition being clearly insufficient, the appointment of the receiver by the lower court was erroneous and, as against the intervenor and the bondholders whom he represents, the charges of the receivership do not constitute prior liens upon the property of the defendant corporation.

For these reasons, the judgment heretofore rendered, reversing the action of the district court, should be adhered to.

AMES, C., concurs.

By the Court: For the reasons stated in the foregoing opinion, the former judgment of reversal entered in this court is adhered to

**REVERSED.**



STATE OF NEBRASKA, EX REL. C. W. McCOMB, v. CHICAGO,  
BURLINGTON & QUINCY RAILROAD COMPANY.

FILED APRIL 7, 1904. No. 13,478.

1. **Carriers: DUTIES TO SHIPPERS.** It is the duty of a railroad company to furnish the necessary cars to transport the goods which are offered to it for carriage, but, when the carrier has furnished itself with the appliances necessary to transport an amount of freight which may, in the usual course of events, be reasonably expected to be offered to it for carriage, taking into consideration the fact that at certain seasons more cars are needed, it has fulfilled its duty in that regard, and it will not be required to provide for such a rush of grain or other goods for transportation as may only occur in any given locality temporarily or at long intervals of time.
2. ———: ———. It is the duty of a railroad corporation, both under the common law, and by statute in this state, to supply cars to all persons or associations handling or shipping grain, without favoritism or discrimination in any respect whatever.
3. ———: ———: (DISCRIMINATION. During a temporary scarcity of cars, a railroad company is entitled to consider, in apportioning cars among grain dealers, their relative volume of business and facilities for the loading of cars. Though there may be a difference in the number of cars furnished different grain dealers at the same railroad station, still, if no favoritism or discrimination is shown and the number of cars furnished each is in a fair proportion to his volume of business, facilities for loading and grain in sight, no shipper has a right to complain of this difference, though he may not obtain all the cars he deems necessary for his business. /

ORIGINAL application for a writ of mandamus to compel respondent to furnish facilities for shipping grain. *Writ denied.*

*Smyth & Smith, for relator.*

*J. W. Deweese and Frank E. Bishop, contra.*

LETTON, C.

This is an original application for a writ of mandamus in this court. On the 22d day of August, 1903, C. W. McComb, a farmer, living about 4 miles from Wilsonville,

in Furnas county, Nebraska, began the business of buying and shipping grain at Wilsonville in competition with 2 elevators there situated, one owned by S. A. Austin and the other by the Central Granaries Company, a corporation. From the day he began business until about September 5, he obtained all the cars from the respondent necessary for the carrying on of his business. He alleges in his application that, on or about the 1st day of October, 1903, and on divers dates since then, he requested that the respondent furnish him all the cars he needed in his business or that, if it could not do that, it supply him with 2 cars for each 3 furnished each of the elevators. He alleges that the volume of his business is such that he requires 2 cars for each 3 used by each elevator. He says that it refused to furnish him cars as he required and that, during the 2 weeks ending October 18, 1903, it supplied him with only 2 cars, while it supplied the elevators with 23 cars. That he demanded of the respondent a just proportion of the empty grain cars available at Wilsonville, but that the company, through its agent, declared that the elevators should have the preference. He avers that such discrimination will ruin his business, and he prays for a peremptory writ of mandamus commanding the respondent to furnish him, whenever demanded, with 2 cars to each 3 furnished each of the elevators; that the respondent be commanded to afford him equal facilities in all respects with each elevator, and to cease all discrimination of any kind and character against him in favor of the elevators.

The answer of the respondent to the alternative writ alleges, in substance, that there are 2 large and well equipped grain elevators at Wilsonville; that the relator McComb has no elevator, shovel house or any convenience adjacent to the track for loading of grain into the cars; that, owing to the manner of his loading, he occupies a whole day for loading 1 car, while the elevators load cars at the rate of 1 car in 2 hours, and, consequently, the elevators need and can use many more cars than he could

handle. It further says that the demand for cars about the first day of September, 1903, was so great that it was, temporarily, impossible for the company to furnish sufficient cars; that it used every reasonable effort to procure cars and, since it could not obtain all that were demanded at Wilsonville, it adopted the plan of dividing the cars between the 2 elevators and the relator on an equitable and just basis, in accordance with the relative amount of grain handled by the elevators and the relator, and taking into consideration the facilities for handling of grain by each of said shippers. It denies that, during the 2 weeks ending October 18, 1903, the relator was supplied with but 2 cars, while the elevators had 23, but alleges that the relator had 5 cars during this period, while 1 elevator was furnished with 7 and the other with 8 cars. It denies any discrimination between the relator and the elevators, and alleges that, although at the time it was well equipped with the necessary cars for handling the ordinary business coming to the railroad, yet, at that time, the demand for cars in the shipment of grain was unusual, and that, temporarily, all the cars demanded could not be furnished.

It is the duty of a railroad company to provide itself with all the instrumentalities and facilities necessary to carry on the business for which it is organized. It must furnish the necessary cars to transport the goods which are offered to it for carriage, but to this rule there is an exception. When the carrier has furnished itself with the appliances necessary to transport an amount of freight which may, in the usual course of events, be reasonably expected to be offered to it for carriage, taking into consideration the fact that at certain seasons more cars are needed, it has fulfilled its duty in that regard, and it will not be required to provide for such a rush of grain or other goods for transportation as may only occur in any given locality temporarily or at long intervals of time.

In this connection, the testimony of Mr. Calvert, the superintendent of the lines of the respondent west of the

Missouri river, is that the railroad company is well supplied with cars. That at times the cars are so plentiful that they have difficulty in storing them, and that usually it has more cars than it needs in taking care of the business offered; that a scarcity of cars existed at the time the relator complains of, and that at the present time cars are comparatively plentiful. He testifies that frequently, by the manner of doing business by grain dealers, shipments are delayed until a certain time when the markets will justify a quick sale, and this causes a congestion of business on the railroad. That he has frequently known on the Burlington & M. R. R. Co. in Nebraska upwards of 2,000 box cars held for orders up to the 20th of the month, and by the 26th the railroad company would be probably that many cars short of being able to fill its orders. That at times there is a rush and at times there is a dearth of business, but that the railroad company has enough cars to take care of the business. These facts are not denied. Under this state of facts, the complaint of the relator that the respondent is not sufficiently provided with cars in order to transact the business of the public does not seem to be well founded.

Since there was a scarcity of cars during a part of the period Mr. McComb was in business, what was the duty of the respondent as to their distribution among those desiring to ship grain over its line of road?

Part of section 1, article V, chapter 72, Compiled Statutes 1903 (Annotated Statutes, 10007), is as follows: "Every railroad company or corporation operating a railroad in the state of Nebraska shall afford equal facilities to all persons or associations who desire to erect or operate, or who are engaged in operating grain elevators, or in handling or shipping grain at or contiguous to any station of its road, and shall supply side tracks and switch connections, and shall supply cars and all facilities for erecting elevators and for handling and shipping grain to all persons or associations so erecting or operating such elevators, or handling and shipping grain, without favorit-

ism or discrimination in any respect whatever." This provision, so far as it requires railroad companies to supply cars for shipping grain without discrimination, is merely declaratory of the common law. Under this provision, it was manifestly the duty of the respondent to refrain from discrimination between McComb and the 2 elevators in the furnishing of cars for use in the business of buying and shipping grain at the station at Wilsonville. Whether or not this has been done is a question of fact which must be determined from the evidence.

The evidence shows that the elevator and bins of the Central Granaries Company have a capacity of about 10,000 to 12,000 bushels of grain. That the elevator and bins of Mr. Austin have a capacity of about 8,500 bushels. That these elevators and bins are situated close to the railroad track; that the Central Granaries Company have facilities for and can load 8 cars of grain a day; that the Austin elevator can load 10 cars a day. That Mr. McComb has a bin at his residence, which is about 2 blocks from the railroad track, that holds 2,500 bushels, and that he has rented other bins in the town which in all have a storage capacity of about 7,500 bushels. Upon his farm, about 4 miles from town, he has about 4,500 bushels of grain which were raised on the farm, but this we think should not be taken into consideration upon the question of the volume of his business as a grain dealer. The only means of loading cars which he possesses is by hauling the grain in wagons and shoveling the same into cars. The evidence shows that he has usually loaded 1 car a day, although upon one occasion he loaded 2 cars in that length of time. It appears that both the elevators and Mr. McComb received all the cars they needed up to about the 5th day of September, but, afterwards, up to the time of the beginning of the suit, a scarcity of cars existed, in fact, to such an extent that each of the elevators and McComb, also, was compelled to turn away and refuse to buy large quantities of grain—one of the dealers stating that he had turned away 60,000

bushels and the other 50,000 bushels. The only question then necessary for us to decide is as to whether or not, taking into consideration the volume of Mr. McComb's business, his facilities for loading cars, and all the circumstances as compared with the volume of business and facilities of loading of each of the elevator owners, he has been unjustly discriminated against by the respondent, and whether it is the respondent's duty to furnish him with 2 cars for each 3 furnished to each of the elevators.

Mr. McComb began business on the 22d of August. Up to the 5th of September, he obtained all the cars that he could use, as did both of the elevators. The scarcity of cars appears to have begun at that time. The evidence shows that from August 22 to September 5, inclusive, Mr. McComb received 8 cars, Mr. Austin 17 and the Central Granaries Company 15. Mr. McComb therefore received one-fourth of the number of cars received by both elevators and, as this was all he wanted, it was presumably the measure of the volume of his business and of his ability to handle grain, with his inadequate facilities as compared with those possessed by the elevators. From the 22d of August to October 20, the day before this action was commenced, Mr. McComb had received 15 cars, Mr. Austin 41 and the Central Granaries Company 34. During the entire period from August 22 to October 20, therefore, Mr. McComb had received exactly one-fifth of the number of cars furnished to both elevators. If we compare the cars furnished during the entire period with that in which each party was supplied with all the cars that could be used in his business, it will appear that McComb received  $3\frac{3}{4}$  cars less during the entire period than he would have been entitled to, if we take his needs during the time from August 22 to September 5 as a fair and just criterion. According to his testimony he could have used more cars than this, but so could each of the elevators. The question is not whether he received all the cars he wanted, but whether the cars on hand were

apportioned in fairness and without unjust discrimination among the 3 grain dealers.

It is clear that an individual loading grain into cars by shoveling the same from wagons, other things being equal, has not the ability to load as many cars in a day as a well equipped elevator, and the testimony in this case clearly shows that the volume of Mr. McComb's business is not such as to require him to be furnished with 4 cars to every 6 furnished to both of the elevators in Wilsonville. It further appears that the railroad company prefers to have the grain shipped from elevators, and that Mr. McComb received something less than his fair proportion of cars, but, under no view of the evidence that we have been able to take, can we say he was at the time this action was begun entitled to the number of cars that he asks. From a statement in the evidence furnished by the agent at Wilsonville, it appears that since the 23d of October inclusive to the 30th of November inclusive, Mr. McComb has been furnished with 23 cars, Austin 44 and the Central Granaries Company 48, which is the exact proportion furnished him before September 5, when he had all he wanted, and from Mr. Calvert's testimony it would seem that the scarcity of cars is now over.

The purpose of a writ of mandamus is to compel something to be done which ought to be done. "The question whether a mandamus should issue to protect the interest of the public does not depend upon a state of facts existing when the petition is filed, if that state of facts \* \* \* has ceased to exist when the final judgment is rendered." *Northern P. R. Co. v. State*, 142 U. S. 492; *State v. Newman*, 25 Neb. 35. The respondent is not discriminating against the relator at this time, and the neglect of duty of which he complains does not now exist. The object of the writ of mandamus being only to compel action, the relator is not at this time entitled to the writ. Although he was not entitled to all he asked for in his application, yet he had cause to complain at the time his action was begun, and, for that reason, it is only just to him that he

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should recover his costs herein expended. *State v. Newman*, 25 Neb. 35; *State v. Anderson*, 100 Wis. 523.

He is also entitled to the benefit of his action so far as may be. Since it is a continuing duty on the part of the respondent to furnish him cars without unjust discrimination, and in order to afford speedy relief if this duty is not performed in future, we recommend that the writ be refused at this time, with leave to respondent to apply for the issuance of the same in this case in the future if necessity arises, upon notice to the respondent, and that the costs of this proceeding be taxed to the respondent.

DUFFIE and KIRKPATRICK, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the writ of mandamus applied for is refused, with leave to respondent to apply for the issuance of the same in the future if the necessity arises, upon notice to the respondent. It is further ordered that the costs of this proceeding be taxed to the respondent.

WRIT DENIED.

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CUDAHY PACKING COMPANY V. JAMES W. ROY.

FILED APRIL 7, 1904. No. 13,491.

1. **Master and Servant: APPLIANCES.** A master is bound to use such care as the circumstances reasonably demand to see that appliances furnished his servants for use in his business are reasonably safe. He is not liable for defects, of which he has no notice, unless the exercise of ordinary care would have resulted in notice.
2. **Error: INSTRUCTIONS.** Instructions examined, and *held*, under the facts in this case, to be erroneous and prejudicial to the defendant.

ERROR to the district court for Douglas county: WIL-  
LARD W. SLABAUGH, JUDGE. *Reversed.*



*Greene, Breckenridge & Kinsler*, for plaintiff in error.

*A. C. Pancoast and A. H. Murdock*, contra.

LEETON, C.

This action was brought by James W. Roy against the Cudahy Packing Company to recover damages for personal injuries sustained by him while in the employ of said company. It appears that Roy was employed in that part of the Cudahy Packing Company's works, in South Omaha, known as the press room; that it was his duty to open and close a gate or valve by which certain soft tankage, consisting of offal, etc., contained in a tank situated upon the second floor of the tank-house and projecting through the floor into a room upon the first floor, in which the plaintiff worked, was emptied into a truck for the purpose of being conveyed to a press, in the process of the manufacture of fertilizer. This gate was opened and closed by means of a cast iron lever about 4 feet long and between 1 and 2 inches in diameter. While the plaintiff was attempting to close this gate, the lever broke, causing the plaintiff to fall backwards, by which the injuries complained of resulted. In his petition the plaintiff alleges that the company negligently provided an inefficient and defective appliance, that the lever was too small for the pressure that was necessary to be placed upon it; that it was of brittle cast iron, that it was too short, that it broke at its weakest point where there was a flaw in the iron, which defect was unknown to the plaintiff and, owing to the height of the lever, the plaintiff could not have discovered it, but the defendant might have discovered it by the exercise of due care and diligence in the selection and inspection of the same. He further alleges that the floor was greasy and slippery, and that the company failed to furnish him a reasonably safe and secure platform upon which to stand. That he had informed the superintendent of the need of this platform, and said superintendent in-

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structed him to continue to use it for a short time, when he would have the necessary improvements made.

The defense is substantially the assumption of risks incident to the employment by the plaintiff, contributory negligence, that the defect in the lever was latent and was not discoverable by inspection, and lack of negligence in that respect by defendant.

The evidence shows that, a short time before the accident happened, the Cudahy Packing Company fitted up what was called the new tank-room at their packing house in South Omaha. That the witness, A. W. Ruff, who was the purchasing agent of the company, bought the gate valves and levers in use in that tank-room. That, before purchasing these appliances, he went to Chicago and examined the tank valves in use in several packing houses there, and also the patterns used for the plant of the Armour Packing Company in Kansas City, and that valves and levers of this pattern were in use in a number of packing houses in Kansas City and Chicago. The plaintiff had been working for the company as a common laborer for a number of years prior to the accident, and had been employed in the tank-room for about 3 weeks prior to that time. It appears that the tank-room or press-room, as it has been variously termed by the witnesses, was not in a completed condition. That the carpenters were still at work there, and that the gate which the plaintiff was operating had only been in use a short time when the accident happened.

It was the plaintiff's duty to open the valve by which a portion of the contents of the tank on the second floor was permitted to descend into a truck upon the first floor, and to close the valve when the truck was full. On the day the accident happened, the tank was empty; the plaintiff had been on the second floor cleaning it out; when he returned, a young man who had been trying to shut the valve had failed to do so on account of it being stuck, when the plaintiff took hold of the lever by which the valve was pulled and, while pulling it in the attempt to shut the

valve, the lever suddenly snapped, allowing him to fall over backwards, whereby he was injured. The lever itself was introduced in evidence and showed clearly, at the point of breakage, a "blow-hole" or "sand-hole," as it has been variously termed by the witnesses, extending from a point at or near the surface of the lever for a distance of five-eighths of an inch toward the center of the same, the effect of which would necessarily be to weaken it at that point.

The defendant complains of the admission of evidence in regard to a promise to make more convenient the place where the plaintiff stood, while at his work, and the failure of the defendant to carry out such promise. There is no evidence in the record which shows that the defective condition of the place where the plaintiff stood was in any manner responsible for the injuries which he suffered. But this was an issue in the case made by the pleadings and, if the defendant desired to remove the consideration of the same from the jury, it should have requested the court to do so by tendering an appropriate instruction.

Complaint has been made by the defendant of the rulings of the trial court upon the admission or rejection of evidence, especially of the witnesses Brizendine and Bergquist; but an examination of the record shows that substantially the same questions which were excluded were, at another point in the examination of the witnesses, asked and answered without objection, and hence the defendant can not complain.

The vital point in this case, as we view it, is whether or not the defendant used ordinary and reasonable care to furnish the plaintiff with a lever which was reasonably safe for the purpose for which it was used. The rule is well settled in this state that it is the duty of a master to use ordinary and reasonable care to furnish appliances reasonably safe for the use of his servants in carrying on his business, and that a failure to exercise such reasonable and ordinary care upon his part renders him liable, if the servant suffers any injury by reason of his negligence in

that behalf. The master is not an insurer of the safety of the appliances which he furnishes. If he exercises the reasonable care which a prudent man would ordinarily take for his own safety, under like circumstances, in furnishing his servants with instruments reasonably safe for the particular purpose for which they are used, he has fulfilled his whole duty in that respect. It was the duty of the employer to use reasonable care in the furnishing of a lever of sufficient size, and to use reasonable care in the inspection of the lever at the time that the same was put in place, and if any defect had been visible or discoverable by the use of such care, by which a reasonable man might conclude that it was weakened or rendered unsafe for the purpose for which it was used, then the defendant would become liable for any damages which resulted in consequence thereof. The question as to whether or not the defect was obvious or was latent, so that an inspection of the lever would not have revealed it, is a matter for the jury to determine from all the evidence in the case, and it is for the jury to say whether or not the master used reasonable care in furnishing a lever which proved to be not sufficiently strong for the purpose, either by reason of its lack of size or by reason of a defect therein. It can not begin its inquiry with the assumption that it is the master's absolute duty to furnish a safe appliance, but rather its inquiry should be whether he used reasonable care to provide such an appliance.

In the sixth instruction to the jury, it is said by the court: "It is the duty of the master to his servant to provide his servant with reasonably safe machinery and appliances with which to work, and if the master fails in this regard and the servant is injured thereby, then the master is liable for such injury, unless the negligence or want of ordinary care of the servant contributed to his injury."

The tenth instruction was as follows: "If you believe from the evidence that plaintiff was injured substantially as alleged, and that such injury was caused by the negli-

gence of the defendant in providing the lever for use by plaintiff, and that plaintiff did not assume the risk of danger arising from its use, and that the plaintiff was not guilty of contributory negligence, then you should find for the plaintiff and assess his recovery as hereinafter stated; but if you do not so find, your verdict should be for the defendant."

By these instructions, the jury were told that it was the duty of the defendant to provide Roy with a reasonably safe lever, and if it failed in this duty and Roy sustained injury, it was liable. It is true that, by the twelfth instruction, the jury were told that if, by the exercise of reasonable care and prudence on the part of the defendant, the defect in the lever would not have been discovered before the time of the injury, then the defendant would not be negligent with reference thereto; but, taking the instructions as a whole, we are satisfied that, under the circumstances in this case, where the question of the master's liability to his servant rests upon the single question, whether or not the master used ordinary and reasonable care in furnishing and inspecting the lever whose breaking caused the accident, and where the master's liability may rest largely upon the question whether the defect in the lever was one which ordinary care could have discovered and guarded against or was latent, so that the exercise of reasonable care by the master could not have discovered it, the unqualified statement that it was the master's duty to his servant to furnish a reasonably safe appliance was erroneous. We do not think that the proper rule can be better stated than in the language of Commissioner IRVINE, in *Lincoln Street R. Co. v. Cor.* 48 Neb. 807:

"To a legal mind the word 'reasonably' might perhaps imply the element of care; but we must deal with the instructions in the sense in which they would be understood by the jury. Notwithstanding these qualifying words, we think it quite clear, as already stated, that the instructions made the case turn upon the fact of danger and not

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the fact of negligence. A master does not insure his servants against defective appliances. He is not chargeable in all events because the appliances furnished his employees are defective. He is liable only when he has been negligent in the matter. The rule is that as to his servants he is bound to use such care as the circumstances reasonably demand, to see that the appliances furnished are reasonably safe for use, and that they are afterwards maintained in such reasonably safe condition. He is not liable for defects of which he has no notice, unless the exercise of ordinary care would have resulted in notice. *Sioux City & P. R. Co. v. Finlayson*, 16 Neb. 578; *Missouri P. R. Co. v. Lewis*, 24 Neb. 848; *Union P. R. Co. v. Broderick*, 30 Neb. 735, all recognize this rule." In *Omaha Bottling Co. v. Theiler*, 59 Neb. 257, it is said by SULLIVAN, J.:

"The measure of defendant's duty to its servants was the care required by the usual and ordinary usage of the business. The standard of due care is the conduct of the average prudent man." See, also, *Chicago, B. & Q. R. Co. v. Oyster*, 58 Neb. 1; *Chicago, B. & Q. R. Co. v. Kellogg*, 55 Neb. 748; *O'Neill v. Chicago, R. I. & P. R. Co.*, 66 Neb. 638. The principle stated in *Leigh v. Omaha Street R. Co.*, 36 Neb. 131, and in *Hammond v. Johnson*, 38 Neb. 244, has been modified by the later decisions of this court.

In this case, where the question of fact as to whether the master had been guilty of negligence or not is so narrow, the attention of the jury should have been clearly directed to the limit of the master's liability. We do not think that the giving of the twelfth instruction cured the prejudicial language of the charge in other respects.

For these reasons, we recommend that the judgment of the district court be reversed.

DUFFIE and KIRKPATRICK, CC., concur.

By the Court: For the reasons stated in the foregoing

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opinion, the judgment of the district court is reversed and the cause remanded for further proceedings.

REVERSED.

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**WILLIAM A. GOURLAY V. ADOLPH L. PROKOP ET AL.\***

FILED APRIL 7, 1904. No. 13,510.

**Pleadings: AMENDMENTS: STATUTE OF LIMITATIONS.** Where the original petition, in an action for conversion against a bailee for sale, was defective for lack of the allegation that a reasonable time had elapsed within which he might sell the property, before demand for its return was made, the filing of an amended petition, by which such allegation was inserted, *held* not to be the commencement of a new action, so as to permit the statute of limitations to interpose as a bar between the filing of the original petition and the amendment.

ERROR to the district court for Saline county: GEORGE W. STUBBS, JUDGE. *Reversed.*

*F. I. Foss, B. V. Kohout and R. D. Brown*, for plaintiff in error.

*George H. Hastings and W. S. McGintie, contra.*

LETTON, C.

On February 19, 1900, a bill of particulars was filed in justice court before E. D. Fay, a justice of the peace, in and for Saline county, Nebraska, as follows: "Now comes the plaintiff and says that, on or about May 16, 1898, he delivered to defendant, Adolph L. Prokop, one Crown organ, one organ stool, and one organ instruction book of the value of \$68. 2. The plaintiff says that, on or about May 10, 1898, he agreed with defendant, Adolph L. Prokop, that he should sell said organ, stool and book, and any amount received over and above the amount of \$68 should be retained by him as his commission for such sale.

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\* Rehearing allowed. See opinion, p. 612, *post*.

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3. That some time between May 16, 1898, and March 10, 1899, Joseph Jiskra became a partner of defendant Adolph L. Prokop. 4. Plaintiff says that, on or about March 10, 1899, he made a demand for said organ, stool and book, and that defendant refused to deliver the above named articles to plaintiff, and that defendants have never paid for the same, though often requested so to do. Wherefore, plaintiff asks judgment against defendants for the sum of \$68, with interest from the 10th day of March, 1899, and costs of suit." Issues were made up, a trial had, and an appeal taken from the judgment to the district court. On the 7th day of May, 1900, the following petition was filed in the district court: "1. The plaintiff complains of the defendants for that, on or about the 16th day of May, 1898, the defendant, Adolph L. Prokop, kept a store and warehouse at Wilber, Saline county, Nebraska; that soon after May 16, 1898, Joseph Jiskra became a partner with the said Adolph L. Prokop; that they kept in their store and warehouse a stock of furniture; that the plaintiff is engaged in and is a dealer in musical instruments; that the defendants desired to sell musical instruments on commission for the plaintiff, and desired to have a musical instrument sent to them that they might keep the same on exhibition and for the purpose of sale, and, in consideration of the plaintiff sending the musical instrument to the defendants that they might have it for the purpose of sale, the defendants agreed to safely stow and safely keep in said store the following goods which the plaintiff sent to them under the foregoing arrangements, to wit, 1 Crown organ, 1 organ stool, 1 organ instruction book, of the value of \$68 which was the property of the plaintiff; and the defendants as storekeepers and warehousemen received said goods and agreed to keep the same safely. 2. At the time that the said goods were delivered to the defendants, the plaintiff informed them that it was necessary for their preservation that they should be safely kept and insured. 3. The defendants, while said goods were in said store and warehouse, neglected and did not insure the same, but per-



mitted said goods to be burned and destroyed, on or about the first day of May, 1899, whereby said goods were injured and wholly lost to the plaintiff to the damage of plaintiff in the sum of \$68. 4. The plaintiff says that, on or about March 10, 1899, he made a demand for said organ, stool and instruction book of the defendants, and desired that said organ, stool and instruction book be returned from said defendants to the plaintiff, but said defendants refused to deliver the above named articles to the plaintiff, and the defendants have never paid for the same, though often requested so to do. 5. Wherefore, the plaintiff asks judgment against the defendants for the sum of \$68, with interest from the 10th day of March, 1899, and costs of suit." Issues were made up, the cause tried to a jury and a judgment rendered in favor of the plaintiff and against the defendant. Upon proceedings in error in this court, the judgment was reversed and the cause remanded for further proceedings. *Prokop v. Gourlay*, 65 Neb. 504.

On the 23d day of March, 1903, an amended petition was filed in the district court as follows: "1. And now comes the plaintiff and says that, on or about May 16, 1898, he delivered to the defendant, Adolph L. Prokop, one Crown organ, one organ stool, and one instruction book of the value of \$68. 2. The plaintiff says that, on or about May 16, 1898, he agreed with the defendant, Adolph Prokop, that he should sell said organ, stool and book, and that any amount received by him over and above the amount of \$68 should be retained by him as commission for said sale. 3. That sometime between May 16, 1898, and March 10, 1899, Joseph Jiskra became a partner with Adolph L. Prokop and interested in said store, and, as partner, assumed the contract as above set forth with the said Adolph L. Prokop and this plaintiff. 4. Said parties had said organ, stool and book for a reasonable time and did not sell the same, and the plaintiff says that a reasonable time within which to sell said organ, stool and book would be from 6 to 8 months. 5. The defendants having had said organ, stool and book for a reasonable time and not having

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sold the same, the plaintiff, on or about March 10, 1899, made demand for said organ, stool and book, and defendants refused to deliver the above named articles to plaintiff, but converted the same to their own use. 6. The plaintiff says that the reasonable value of said property was the sum of \$68. Wherefore, plaintiff prays for a judgment against these defendants for the sum of \$68, with interest at 7 per cent. from March 10, and costs of suit."

A motion was made by the defendants to strike the amended petition, for the reason that it was not an amendment but set up a new cause of action, and did not accrue within 4 years, and that, so far as amended, it was a departure from the original cause of action in the justice court. This motion was overruled. A demurrer was then filed to the petition and sustained, upon the ground that the amended petition set up a new cause of action, and was therefore barred by the statute of limitations, and the cause was thereupon dismissed. Exception was duly taken to the ruling of the district court, and the cause is here upon error.

Without considering whether the question proposed can be properly raised by demurrer, it will be seen that there is only one question presented and that is, whether or not the amendment to the petition was such as to set up a new cause of action, or whether the additional facts alleged were merely an amplification of the original. From the opinion of Commissioner ALBERT, it appears that the judgment based upon the first petition was reversed, for the reason that the petition, having failed to allege that a reasonable time had elapsed after the delivery of the organ to the bailee, was insufficient to state a cause of action in conversion. The only additional allegations in the amended petition to those in the bill of particulars upon which the action was begun are, that the defendants had the property for a reasonable time and did not sell the same; that a reasonable time within which to sell it would be from 6 to 8 months, and that the reasonable value of

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the property was the sum of \$68. It is obvious that the subject matter of the action is the same, that the cause of action is the same, and the relief sought is the same, in these several pleadings. The grounds of the action are the delivery of possession of the property to the defendants as bailees, the demand made upon them by the plaintiff for its return, the refusal and conversion to their own use. The only additional fact alleged being, that they had been in possession of the property a reasonable length of time within which to make the sale before the plaintiff made the demand. It is elementary that, where the identity of the cause of action and the relief demanded are the same, a change in the form of the allegations, or an additional allegation amplifying the original petition, does not set up a new cause of action. No new wrong is charged upon the part of the defendants by the amended petition; the action originally was for the wrongful conversion of the organ, though the cause was defectively stated, and the amended petition merely supplies a necessary allegation omitted in the former pleading.

This is allowed by section 144 of the code. The statute of limitations ceased to run upon the beginning of the action in the justice court; and the cause of action being the same, it is not now barred. The district court erred in sustaining the demurrer to the petition, and the cause should be reversed and remanded for further proceedings.

For these reasons, we recommend that the judgment of the district court be reversed.

DUFFIE and KIRKPATRICK, CC., concur.

By the Court: The conclusions reached by the commissioners are approved; and it appearing that the adoption of the recommendations made will result in a right decision of the cause, it is ordered that the judgment of the district court be reversed and the cause remanded for further proceedings according to law.

REVERSED.

The following opinion on rehearing was filed October 5, 1904. *Judgment of reversal adhered to:*

**Pleadings:** CAUSE OF ACTION. Pleadings examined, and held that the amended petition does not state a new and different cause of action from that attempted to be stated in the bill of particulars and the original petition.

BARNES, J.

The defendants, in their brief and oral argument on the rehearing, strenuously contend that, by the amended petition, a new and different cause of action was stated from that set forth in the original petition; that, the new cause of action being barred by the statute of limitations, the trial court was right in sustaining the demurrer to the amended petition, and our opinion reversing the judgment of the district court should be set aside. The foregoing question is the only one fairly presented for our determination. This requires a careful examination of the pleadings, including the bill of particulars filed in the justice court where the action was originally commenced, and our former opinions herein. The bill of particulars, the original petition and the amended petition filed in the district court are set out in Commissioner LERTON'S opinion (*Gourlay v. Prokop*, ante, p. 607), and it is unnecessary for us to quote them herein. It appears, by referring to that opinion, if the words, "said parties had said organ, stool and book for a reasonable time and did not sell the same, and the plaintiff says that a reasonable time within which to sell said organ, stool and book would be from 6 to 8 months," were stricken from the amended petition, the remaining allegations would be identical with those contained in the bill of particulars on which the cause was tried in the justice court. If the amended petition states a cause of action for conversion, then the bill of particulars stated such a cause of action, if any. It seems from reading the opinion of Commission ALBERT (*Prokop v. Gourlay*, 65 Neb. 504), that the case was considered

and treated therein as an action for conversion, for the learned commissioner made use of the following language:

"It is not easy to determine, from an inspection of the petition, whether the plaintiff's action was brought to recover for damages sustained by reason of the negligence of his bailees, or for damages for the conversion of the property by such bailees. But, as the evidence is insufficient to justify a recovery on the ground of negligence, and the plaintiff presented his case on the other theory, the sufficiency of the petition to sustain the judgment should be tested by the rules of pleading applicable to actions for conversion. Tested by those rules, the petition is insufficient. No time was fixed for the termination of the contract under which the property was left with Prokop by the plaintiff. That being true, the law will imply a reasonable time. In other words, the plaintiff would have a right to a return of the property only after the bailee had had a reasonable time in which to make the sale contemplated by the contract, and a demand before the expiration of such time would be premature. It will be conceded that, had the time been expressly fixed by the contract, the plaintiff in an action of conversion would have been required to allege the expiration of the contract, or some violation of it, to state a cause of action. The only difference between a case of that kind and the present is that in this case, instead of the time the defendants might retain possession of the property being expressly fixed by the contract, it is implied. It is just as essential that the expiration of the time be alleged, where it is implied, as where it is expressly stated, and the omission of such allegation is fatal to the petition in this case."

It seems that, in response to the rule announced above, the averment first above quoted was inserted in the amended petition. Without doubt the bill of particulars filed in the justice court was somewhat defective, but it is clearly apparent that no attempt was made thereby to state a cause of action against the defendants for negligence as bailees. There was an attempt to state a cause of action

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in conversion, and when the original petition was filed in the district court, a motion to strike out the new matter stating an agreement to safely store, keep and insure the property, if one had been filed, must have been sustained. Such allegations were insufficient to state a cause of action for negligence, were redundant and immaterial matter, and were very properly omitted from the amended petition. It seems clear that the action as commenced in the justice court was one for conversion. The original petition contained a statement of the same facts alleged in the bill of particulars; that petition was insufficient, as held in the opinion of Commissioner ALBERT, and such deficiency was supplied by the amended petition. The cause of action, although sometimes defectively stated, has remained the same from the filing of the bill of particulars to and including the amended petition in question herein. No new cause of action having been stated, and the commencement of the action before the justice having interrupted the running of the statute of limitations, the district court erred in sustaining the demurrer.

For the foregoing reasons, our former opinion is adhered to.

REVERSED.

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WILLIAM B. SMITH ET AL. V. CLAY COUNTY.

FILED APRIL 21, 1904. No. 12,569.

**Affirmed.** On rehearing, the former judgment entered in this court is vacated, and the judgment rendered by the district court for Clay county is affirmed. *Mitchell v. Clay County*, 69 Neb. 779, followed.

PER CURIAM.

This case is submitted on rehearing. It is a companion case to *Mitchell v. Clay County*, 69 Neb. 779. In all essential features the two cases are similar. The questions herein presented for consideration and determination are

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decided in the case cited. On the authority of that case, the former judgment entered in this court in this cause, 4 Neb. (Unof.) 872, is vacated, and the judgment rendered by the district court is

**AFFIRMED.**

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**J. L. CAMPBELL ET AL. V. JOHN MORAN ET AL.**

FILED APRIL 21, 1904. No. 13,353.

**Liquor License: PETITION: FREEHOLDER.** A wife, living with her husband on land, the title to which is in the latter and which is occupied by them jointly as a family homestead, is not, by reason thereof, a freeholder within the meaning of section 25, chapter 50, Compiled Statutes, regulating the sale of intoxicating liquors. The same is true as to a husband, living with his wife on land, occupied by them jointly as a homestead, the legal title to which is in her.

**ERROR to the district court for Clay county: GEORGE W. STUBBS, JUDGE. Reversed.**

*Kirkpatrick & Hager, for plaintiffs in error.*

*Leslie G. Hurd, Paul E. Boslaugh and John A. Moore, contra.*

**HOLCOMB, C. J.**

The present controversy is with respect to an order of the authorities of the village of Clay Center granting a license to the defendants in error to sell intoxicating liquors. The district court having on appeal affirmed the order of the village board, the cause is brought here for review by proceedings in error. It is argued that the order granting the license is irregular and erroneous because no sufficient petition was presented to the village trustees as required by the law regulating the sale of intoxicating liquors. Among those who signed the petition are the names of several whose qualifications to sign a petition for a license are disputed. Whether such persons

are qualified petitioners depends upon their being freeholders within the meaning of the law. Their interests are limited to a mere homestead right or privilege in lands, occupied as a family homestead, the legal title to which they do not hold, but which is in the wife or husband of such petitioner. If a person having only such homestead right or interest in real estate is not a "resident freeholder" within the meaning of the statute, then the petition in the case at bar is insufficient, and the order thereon, granting a license by the board of trustees and by the district court on appeal, is erroneous, and the judgment will have to be reversed. Section 25, chapter 50, Compiled Statutes (Annotated Statutes, 7175), provides that village authorities may grant a license to sell intoxicating liquors, when a petition therefor shall be signed by 30 of the resident freeholders, or, if there be less than sixty, a majority of the freeholders of the ward or village where the sale of such liquors is to take place. Of course, the legislature, in fixing the qualifications of petitioners for a liquor license, used the term "resident freeholder" as it is ordinarily and commonly understood in legal terminology, where the words have a well recognized and generally accepted meaning. The fact that a qualified petitioner is required to be a resident freeholder is, of itself, evidence that, in the regulation of the traffic, the legislature intended those only should be permitted to act who had attained the status, standing and dignity attributable to those who are owners of property of the stable character of real estate. The test is not only a property qualification, but the person must have title to and interest in the particular kind of property designated. The phrase "resident freeholder" in this connection should be given neither a narrower nor a broader meaning than that which should be given wherever found in the statute, where such requirement is made the basis of the qualification of a person when acting in regard to any designated matter. If the husband who lives with his wife on a homestead, the legal title of which is in her, is a freeholder within the



meaning of the liquor law, then he is a freeholder for all other purposes, where the statute, in general terms, makes that a test of qualification.

In order to determine the question here presented, it is necessary to inquire, first, what is a freeholder; and, second, is the homestead right or interest of the spouse, not owning the legal title, a freehold estate within the meaning of the word as recognized and defined by the authorities? Blackstone defines a freeholder as one having such an estate in lands as is conveyed by livery of seizin, and may be in fee simple or conditional fee, and may be for life only. 2 Blackstone, Commentaries, 104. In Winfield, *Adjudged Words and Phrases*, 277, it is said: "A freeholder is one who holds lands in fee, or for life, or for some indeterminate period." It is also defined as "An estate of inheritance or for life in real property." 8 Am. & Eng. Ency. Law (1st ed.), 898. From the definitions given, it will readily be seen that, in order to be a freeholder, a person must have a property right in and title to real estate, amounting to an estate of inheritance, or for life, or for an indeterminate period. What is required is title to the property, and not simply a contingent or an expectant estate, nor a right of occupancy or a privilege, with power to prevent alienation or incumbrance by the holder of the legal title. While this court has, in construing the law relative to the right of homestead, in all instances, given a most liberal construction for the protection of the homestead claimants and the conservation of the homestead, it has never gone so far, in any of its decisions, as to say that the selection of the homestead by a husband and wife from the separate property of either effected a change of title, or created in the one not holding the legal title a new property interest in the land thus selected as a homestead. The homestead right or privilege granted by statute, before it has ripened into a life estate by the death of the spouse holding the legal title, is a quality of exemption and freedom of the property embraced in the homestead from execution and forced

sale, incumbrance or alienation, without the consent of both husband and wife. The right of homestead, this court has frequently said, is a personal privilege, which may be waived or lost, unless asserted in due time on all proper occasions. *Brownell & Co. v. Stoddard*, 42 Neb. 177; *Schields v. Horbach*, 49 Neb. 262, 271. In *Waples, Homestead and Exemption*, p. 121, it is said:

"The husband conveys no land to his wife by declaring homestead; he lets her in to equal control as to alienation, and equal right to enjoyment, and to that protection which the law gives to all homestead holders. But when the state's purpose, relative to homestead conservation, has been accomplished, the land title is as before." At page 103 it is said: "There is no conveyance of land or land title in the dedication, allotment or setting apart of the homestead." Again says the author, at page 102: "The state bestows no homestead property on anybody. It interferes with no man's title. It protects what he already owns, under conditions and with limitations. \* \* \* The homestead right has been called an incumbrance upon land. \* \* \* So it is held that, by the carving of the homestead out of land, the incumbrance is thus put upon it, but the title remains as before."

This view as to the effect of the dedication of land as a homestead must, we think, be the true one. There is nothing in the statute, providing for the selection and exemption of a homestead, that operates to transfer the title to all or any part of the real property. Its effect is to withdraw the land, thus selected, from forced sale, and prevent alienation without the consent of both spouses. The statute, as its title indicates, treats the subject as one of exemption, rather than the creation of any new estate in the property in the spouse not holding the legal title. It is true that section 17, chapter 36, Compiled Statutes (Annotated Statutes, 6216), provides that, upon the death of the holder of the legal title to the homestead, the surviving spouse shall be vested with a life estate therein, and this estate, when it becomes vested, doubtless makes

the surviving homestead claimant a freeholder within the ordinary meaning and acceptation of that term; but there is nothing in the section referred to inconsistent with the view, that the full legal title and estate in the homestead property are in the one who holds the fee, prior to death. The manifest purpose of the provisions of section 17, *supra*, is to preserve to both spouses the full benefit of the homestead right, during the whole of the lives of each of those for whose protection the statute was intended. The right or interest of the wife or husband, in the homestead, not holding legal title is quite analogous to the right of dower or the estate by curtesy, both of which are simply contingent and inchoate till, by the death of the owner of the fee, they become vested estates; and all current authority is to the effect that the estate by the curtesy initiate, or the inchoate right of dower, is not a freehold estate, nor have they any of the attributes of a freehold, nor do they become such till death of the husband or wife owning the fee. After the death of the owner of the fee, the estate by curtesy and the right of dower become vested and, as in the case of the death of the fee owner of the homestead, a freehold estate arises in favor of the survivor. In *Holbrook v. Wightman*, 31 Minn. 168, it is said by that court, in speaking of the homestead right:

"We think, therefore, that the plainer and less artificial construction of the language is that the survivor takes a life estate in the homestead premises analogous to that of dower, and we believe this to be the construction which is generally placed upon it by those charged with the duty of executing the law." Citing Potter's Dwaris, Statutes and Constitutions, 179, note; *Edward's Lessee v. Darby*, 12 Wheat. (U. S.) 206.

In *Johnston v. Bush*, 49 Cal. 198, it is held that the dedication of land as a homestead under the homestead laws of that state did not, in any wise, change the title of the property thus dedicated, and that title remained in either the husband or wife, or as the common property of both, as it was before its selection as such homestead.

To the same effect is *Gee v. Moore*, 14 Cal. 472. In *Brame v. Craig*, 12 Ky. 404, it is held that the homestead exemption is not an estate in the land, but only a privilege of occupying the same by a housekeeper with his family as against his creditors. This court has once said, in a cause here on appeal from a confirmation of sale in foreclosure proceedings, that a husband is a freeholder who lives with his wife upon land of which she has the title, when occupied as a homestead. *Salisbury v. Murphy*, 63 Neb. 415. This decision gives warrant for the contention of the defendants in error, to the effect that the petitioners in the case at bar, to whom objections are made, were qualified signers as resident freeholders. The court's utterance, in the case cited, is the only expression heretofore made, which seemingly recognizes a person so situated as being a freeholder within the meaning of that term. The opinion, on its face, discloses that the subject was not exhaustively argued nor thoroughly considered. The case was disposed of almost entirely by the application of the doctrine of *stare decisis*. The decision follows, or purports to follow, *Cummings v. Hyatt*, 54 Neb. 35, and *Hughes v. Milligan*, 42 Kan. 396, 22 Pac. 313. An examination of *Cummings v. Hyatt* discloses that this question was not decided in that case, and that the court, in specific terms, found it unnecessary, and declined to pass upon the point in that controversy. It is said in that opinion, at page 39:

"In relation to the signer of the petition, who was a minor at the time, and the one a man who was occupying property with his wife, which was owned by her and which was their homestead, we are not called upon to discuss or decide whether the trial court was correct or otherwise in its holding that the minor and the man referred to were freeholders within the meaning of the statute, for the reason that the record discloses that there were 2 of the signers of the petition as to whom the parties stipulated that they knew nothing in regard to whether they were freeholders or not. \* \* \* The petitioner based his right to an injunction, in part, on the assertion that 50 freeholders

had not signed the petition, and it devolved on him to prove his assertions, and any of the signers as to whom there was no testimony offered must be presumed to have been freeholders; they being counted, gives the requisite number 50, without an examination of the question of the minor's qualification or that of the man who was occupying as a homestead land owned by his wife."

It is thus made clear that the court was in error in the *Salisbury* case, in saying that the question there for consideration had already been determined in the case of *Cummings v. Hyatt*. In the case of *Hughes v. Milligan, supra*, in which was raised the question of the qualification of signers to a road petition, it is said by the court:

"By the common law the estate of dower was a freehold estate; and also the estate by the curtesy; and although in the latter the title of the land was in the wife, yet upon the birth of a child the husband was called tenant by the curtesy initiate." Say that court, "The interest that the husband has in the homestead of the wife is a different estate from that by curtesy initiate, but in some respects at least it is analogous."

It is quite evident that, in speaking of the right of dower, and of the right of tenant by curtesy under the common law, as being a freehold estate, the court had reference, not to the inchoate right of dower, or the right as tenant by curtesy initiate, but to the estate which became vested upon the death of the owner of the fee. It is contrary to the trend of all the authorities to hold that, under the common law, the inchoate right of dower, or the right of tenant by curtesy, as existing during the life of the owner of the fee, rises to the dignity of a freehold estate, and this, certainly, has not been the view held to in this jurisdiction since the foundation of the state's jurisprudence. It would seem, therefore, that correct reasoning would lead to a contrary conclusion from that announced by the supreme court of Kansas in the case heretofore cited. If the analogy be proper, then it is obvious that the homestead right of the husband or of the wife to land occupied as a home-

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stead, the legal title to which is held by the other spouse, can not be anything more than an inchoate right similar to that of dower or curtesy initiate, in so far as any title in the land is concerned, and that no vested title or freehold estate arises in favor of the survivor till the death of the owner of the fee. It must follow from what has been said that the homestead right or privilege of the husband or of the wife in land occupied as a homestead, the title to which is in the other, is not a "freehold estate" within the ordinary and generally accepted meaning of the word; and that the petition in the case at bar, for such reason, not having the signatures of the required number of resident freeholders, renders the granting of a license erroneous, and calls for a reversal of the judgment of the district court affirming the action of the village board of trustees granting such license. The judgment is reversed and the cause remanded.

REVERSED.

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STATE OF NEBRASKA V. BANKERS UNION OF THE WORLD  
ET AL.

FILED APRIL 21, 1904. No. 13,595.

1. **Beneficial Associations: UNLAWFUL ACTS: INJUNCTION.** When a fraternal beneficial association refuses and neglects to report to the auditor as required by law, or shall exceed its powers, or conduct its business fraudulently, or fail to comply with any of the provisions of the statute, it is the duty of the auditor to notify the attorney general in writing, and the duty of the attorney general to immediately commence an action against such society to enjoin the same from carrying on any business.
2. **Suspension of Business.** When, in such action, it appears that any of said causes exist, the court must enjoin the defendant from transacting business until such report shall be made, or overt act or violation complained of shall have been corrected, and costs are paid by the defendant.
3. **Reinstatement.** When such report shall be made, or overt act or violation complained of shall have been corrected, and costs are

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paid, it is the duty of the auditor to reinstate such defendant, and the society will then be authorized to continue its business.

4. **Government.** A fraternal beneficial association must have a representative form of government. This requires that the directors or other officers, who have general charge and control of the property and business of the society and the management of its affairs, shall be chosen by the members.
5. **Diverting Funds.** Diverting the funds of the society from the purposes for which they are contributed is a violation of the statute and will be enjoined.
6. **Annual Reports.** All claims for death losses must be included in the annual reports to the auditor. A failure to make such report as the statute requires is sufficient cause for enjoining the society from transacting business.
7. **Incorrect Records and Reports.** The books and records of such society must show the true condition of its business and finances, including its benefit assessments and its liabilities, and if they fail to do so, or if the society fails to report to the auditor the details of its business and financial affairs required by the statute, the society will be enjoined from doing business.
8. **Age Limit and Medical Examinations: MERGER.** Such societies are not allowed to take members who are above the age limit, nor without medical examination, and to do this indirectly by the purchase of the business and risks of another similar society, and consolidating such society with itself, is a violation of law.
9. **Assets: SOLVENCY.** The assets of such a society do not consist in cash, and tangible securities and property alone. If its plan of business is feasible and just, it may rely upon the good faith and solvency of its members. It can not be said to be insolvent when it is reasonably probable that, by its authorized assessments, it can provide sufficient funds to meet its just liabilities.
10. **Pleadings and Evidence: RECEIVER: INJUNCTION.** Under the pleadings and evidence in this case, it is *held* that it is not a case for the appointment of a receiver and winding up the affairs of the society; but, to secure a correction of abuses and irregularities, the defendant is enjoined, under section 16, chapter 47 of the laws of 1897, from transacting business until the law is complied with in the matters specified.

ORIGINAL action for an injunction to restrain defendant from further proceeding with its business. *Injunction allowed.*

*Frank N. Prout, Attorney General, for the state.*

*Field & Andrews, contra.*

SEDGWICK, J.

The defendant is a fraternal beneficial association organized under chapter 47, laws of 1897, "An act defining fraternal beneficiary societies, orders or associations, and regulating the same." Under section 16 of the act, it is the duty of the auditor to notify the attorney general, in writing, whenever any such society has refused or neglected to make the report provided for; or, if any such society shall exceed its powers, or conduct its business fraudulently, or fail to comply with any of the provisions of the act, and upon receiving such notice, it is made the duty of the attorney general to "immediately commence an action against such society to enjoin the same from carrying on any business." The attorney general having received such notice from the auditor, began this action in this court against the defendant in pursuance of the statutory requirements.

The Honorable Robert Ryan was appointed referee to take the evidence and report his findings of fact and conclusions of law. A large amount of evidence was taken by the referee, and he has made an exhaustive report, which concludes with the recommendation that this court, by its judgment, permit the defendant to continue in business under certain directions and restrictions. We do not think that this recommendation is within the purview and meaning of the statute. The requirement of the statute is that, if the court shall find that such society was in default, as charged, the defendant shall be enjoined, and shall not have authority to continue in business until such report shall be made, or overt act or violation complained of shall have been corrected, nor until the costs of such action be paid by it.

On the other hand, the attorney general insists that the court appoint a receiver to wind up the affairs of the



defendant and to "distribute the assets as equity would permit." This, the court can not do in these proceedings. There are, no doubt, some allegations in the petition which would be appropriate in an action in the nature of quo warranto to oust a defendant corporation of its franchise and wind up its affairs, and we do not decide that, under proper pleadings and evidence, such a proceeding might not be maintained. But these proceedings, by the express language of the petition, as well as by the character of the allegations, and the nature and force of the evidence brought to sustain them, must be considered to be under section 16 of the act referred to, and the meaning of that section is that, if the allegations are sustained by the evidence, the defendant shall not be allowed to do business until it has complied with the law.

It is the duty of the court to determine and point out the particulars in which the defendant has failed to comply with the law, and to enjoin the defendant from proceeding to carry on its business until these delinquencies in these respects have been corrected. When this shall have been done by the defendant, it will be the duty of the auditor to reinstate the defendant. The court has been greatly assisted by the work of the referee in his exhaustive and painstaking investigation of the evidence and conclusions of fact derived therefrom.

1. By the provisions of section 10 of the act these societies are required, on or before the first day of March of each year, to make and file with the auditor of public accounts a report for the year ending on the 31st day of December immediately preceding. These reports are to be upon "blank forms to be provided by said auditor," and are to be "verified under oath," and are to contain answers to questions specifically prescribed by the statute, among which are: (3) Number of losses or benefit liabilities incurred. (4) Number of losses or benefit liabilities paid. (7) Number and kind of claims for which assessments have been made. (8) Number and kind of claims compromised or resisted, and brief statement of reasons. It

appears from the findings of the referee, and is abundantly established by the evidence, that the defendant has failed to make the annual reports contemplated by the statute. It is plainly intended by the statute that the defendant shall report all claims against it on account of death losses. When the insured under one of the defendant's policies has died, and the defendant has notice that a claim is made against it on account thereof, there can be no doubt that such claims should be included in its report to the auditor. When the auditor finds that the defendant has not made the report required by the statute, but refuses so to do, it is his duty to notify the attorney general, who should take proceedings to prevent the defendant from further carrying on business until this error is corrected. The reports of the defendant for several years past were not in compliance with the statute in this respect, and the fact that the auditor has not heretofore enforced the law is not a defense in these proceedings in which he is trying so to do, and the defendant is enjoined from transacting business until such report is made.

2. The referee finds:

"It is provided by section A, division 3 of the constitution of the Bankers Union of the World, that the supreme officers of the supreme lodge shall be 9 in number. These, by section C, division 1 of said constitution, are required to be elected by supreme lodge delegates. It is further provided in said section A, as follows: 'There may also be not more than 8 directors elected by said supreme officers. The officials above designated shall together constitute a board of directors, and all the power and authority of the supreme lodge shall, when not in session, be vested in the board of directors, the same as though the said supreme lodge was regularly convened in open session.' It is provided in section B, division 3 of said constitution: 'All of said officers of the supreme lodge shall be elected for the term of 2 years and until their successors are elected and qualified.' The effect of the above provisions is to create a possible board of directors, 17 in

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number, of which board 8 members are to be elected by the executive officers. These 8 directors are not to be chosen by the members of the Bankers Union of the World, nor by the representatives of the said members selected for that purpose."

These findings are abundantly supported by the evidence, and this provision in the organization of this company, is in conflict with section 1 of the act, which provides that "such society shall have a \* \* \* representative form of government." These directors, who control the affairs of the company, must be chosen by the membership thereof, either directly or through representatives chosen by the membership for that purpose. No license to transact business should have been granted to this defendant until such a board of directors was provided for in its organization. The defendant is enjoined from doing business until this error is corrected.

3. It appears from the evidence that the management of the affairs of the society has been exclusively within the control of its supreme executive officers. These officers have not only had charge of the general affairs of the society, but in many instances have dealt with themselves in making contracts in their own personal interest, and, in some instances, in conflict with the interest of the society. In order that the society shall have a representative form of government as required by the statute, the general control of the affairs of the society must be in the hands of directors elected by the membership, as before pointed out. The defendant should not have been licensed to do business while this evil existed, and is therefore enjoined from transacting any further business until this error is corrected.

4. It appears from the findings of the referee, a contract with the president was made by those purporting to act for the defendant society, which was in violation of law, and was afterwards abrogated, and another contract made in January, 1902, giving the president a stated salary per month, and commissions upon policies that had

theretofore been taken, as well as upon policies afterwards to be taken; and the referee concludes that the defendant had no right to give to its president a commission on membership already secured. In this, the referee is undoubtedly right. The salary of the president should have been fixed by its board of directors. It is inconsistent with the policy of the law, under which these societies are organized and authorized to do business, to allow commissions to its managing officers, which are uncertain in amount, and are to be determined by computations from data not within the knowledge of the membership, and to which the members have not ready access. The defendant is therefore enjoined from transacting business until it is made to appear to the satisfaction of the auditor, or by a showing in this case, that no such contracts are in existence, and that no such claims of emolument are made by the president.

5. It is charged in the petition: "By unlawful means, liabilities against said Bankers Union of the World were suddenly created and not shown on the books of said Bankers Union of the World, or in the statements filed by it in the office of the auditor of public accounts of the state of Nebraska, and this condition of affairs was first disclosed by an examination into the affairs of said Bankers Union of the World, made and conducted by the authority and under directions of the auditor of public accounts; such examination of the books and affairs of the defendant, Bankers Union of the World, disclosing the facts herein alleged; and the further fact that the president of the said defendant, Dr. E. C. Spinney, and the vice-president, J. C. Spinney, who is the wife of the said E. C. Spinney, drew from the treasury of said Bankers Union of the World, during the year 1903, the sum of \$20,000 for their own use and benefit, and for their alleged services as president and vice-president of said Bankers Union of the World, in fraud of the rights of the members and certificate holders of said Bankers Union of the World, and while said association was then, and is now,

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indebted to beneficiaries for death losses in the aggregate sum of \$30,000, for the payment of which said association had on hand, at the time of the examination referred to, available assets in the sum of \$2,437.65." Upon this allegation, the referee finds: "From the organization of the Bankers Union of the World, its president advanced various sums to it and for its use. There is in evidence no tabulated statement of the amounts drawn out by him. There is in evidence sufficient data to show that the amounts paid to him as salary, not including commissions, is \$5,015.76. The Bankers Union began business November 14, 1898. The period above contemplated is, therefore, over 5 years. The net sum he has received as salary is at the rate of less than \$1,000 a year during the existence of the Bankers Union of the World"; and, second, "There was paid the vice-president, the wife of the president of the Bankers Union, for services in 1903, \$50 a month for a short period. She received for the remainder of that year, for editing the official paper of the Bankers Union, \$150 a month. The salary of the president of the Bankers Union, for the year 1903, was \$600 a month. The salaries just referred to I find are not exorbitant." This finding of the referee does not appear to us to fully reflect the evidence upon this allegation. We do not want to be understood as expressing an opinion whether the salary as allowed to the president would, or would not, be exorbitant, when allowed by a board of directors selected as the statute requires, and freely acting in the management of the general affairs of this society. The finding of the referee, "That there is in evidence no tabulated statement of the amounts drawn out by him," is, to our minds, more serious in its nature and consequences than would appear to be regarded by the referee. There should be no uncertainty in the accounts between a salaried officer and the society, and the auditor would undoubtedly be justified in refusing a license to a society in whose transactions such uncertainty existed.

The managing officers of these societies are trustees for

the members, and must transact the business that comes within their province for the interests of the members. If it appears from their plan of organization, and their manner of doing business, that the funds of the society are considered and used by them as their personal emolument, they are not to be allowed to transact business. The defendant is enjoined from doing business until it is made to appear to the satisfaction of the auditor, or by a showing in this case, that all claims of the president against the company are fully and finally adjusted; and no claims of the president for compensation for services rendered will be made or entertained, except the regular and reasonable salary as allowed and fixed by the board of directors.

6. The petition alleges that the society is insolvent and unable to meet its pending death claims. A large proportion of the evidence relates to this allegation. The referee finds that the allegation is not proved, and we are entirely satisfied with his finding in that regard. The conduct of the officers of the society in adjusting death claims has without doubt led to great confusion, and unnecessary delay; and merits criticism. Also does its apparent reluctance and neglect to disclose to the proper authorities the true state of affairs regarding these matters, and, possibly, also the provisions of its constitution and by-laws as to the extent of its liabilities upon death claims, and its manner of determining the same. The managing officers have failed to appreciate the fact that the supervising authority of the auditor is such as to require perfect frankness and a full disclosure of its affairs, whenever demanded. We have already indicated that these evils must be corrected before business is continued. But, the allegation that the society is insolvent is wholly unsupported. The plan of its organization, if carried out, will, apparently, furnish ample funds to meet all its just liabilities, and the managing officers have been active and vigilant in the prosecution of its business. It has, apparently, during the last year, paid from the assessments collected for death claims occurring during the year, more than the

total amount of losses for the same period. The assets of such societies do not consist of tangible property and cash in hand alone. Its members pay assessments when called upon to meet the loss occasioned by the death of one of their number. If its plan of operation is feasible, its ability to meet its liabilities depends upon the good faith and solvency of its members. It can not be said that it will not be able to meet its death losses as they occur.

7. It is charged that the defendant has diverted the funds of the society and paid out large sums for the alleged purchase of the business and membership of other purchased organizations, and that the membership of such other purchased organizations were admitted to the defendant association, without medical examination, at lower and less rates of charges and assessments than required from persons originally becoming members of the defendant society. Upon this allegation the referee finds: "While all the transfers of societies above noted, except the Red Cross of Waverly, Iowa, the Home Guardians of Sterling, Illinois, and the Pioneer Life Association of Laverne, Minnesota, were made under sanction of the insurance department of this state, the evils which inhere in such transfers without authority of law have fully justified the auditor's refusal to sanction such transfers. Of these evils, the following are the most conspicuous: There is a temptation to the officers of the absorbed lodges, who receive its fund for disbursement, to use such funds for their own individual advantage. There are of necessity members whose health has failed, or who have passed the age of 55, between the date of entry into the transferred order and its transfer to another order. These must either be ignored and their insurance thus destroyed without their consent, or a physical examination must be waived, contrary to the provisions of the statute of the state. Reserves accumulated must be diverted by the transferred society to an improper purpose, and thus there must be violated a sacred trust." It appears that the insurance department of the state at one

time approved of such methods, and recognized such action as legal. It also appears that, after a change had taken place in the personnel of the department, such action was not sanctioned but disapproved, and that the defendant society, notwithstanding such disapproval, has persisted in the same course of conduct. The statute prescribes the qualifications of members that may be admitted; and to admit members above the age limit, or without medical examination, is clearly in violation of its provisions. What may not be done directly in that regard, can not be done by taking over the entire membership of another society, and the conduct of the defendant was a manifest violation of law. It seems to be the opinion of the referee that this practice had been discontinued before these proceedings were begun, and that no further action on the part of the court is necessary than to express its disapproval thereof. We are inclined to adopt this suggestion.

8. The defendant asks that the court will, in this action, enter an order upon the auditor to reinstate the defendant, but, as before pointed out, the court is not given authority to do so under section 16 of the act. It will be the duty of the auditor to reinstate the defendant when it has complied with the order of this court, and has corrected the errors herein indicated.

The suggestion that the auditor might, through prejudice or partiality, neglect to perform this duty is wholly unwarranted by the evidence. The evidence shows a desire and effort on the part of the auditor to perform the duties enjoined upon him by statute, and his action in commencing these proceedings was not only justified, but required by the facts as disclosed in the evidence. If this judgment is complied with by defendant within 60 days, the injunction will be dissolved. In the meantime, the injunction is continued, and if further action herein becomes necessary to protect or enforce the rights of the parties, upon application of either party, such action can be taken.

JUDGMENT ACCORDINGLY.



HOLCOMB, C. J., dissenting.

I am unable to concur in all the conclusions announced in the majority opinion. I think the defendant society should be reinstated and permitted to continue its business as recommended by the referee, but enjoined from doing certain things which are violative of the law regulating the business of such societies. It seems to me that the construction placed on the section of the statute under consideration operates unnecessarily harshly on mutual fraternal beneficial organizations, and overlooks the interests of the individual members which the statute was designed to protect. The judgment to be entered enjoining the defendant society from doing business until, at a regular or specially called meeting of its membership in delegate convention, there shall be effected a reorganization of the society, and of the plan of conducting its business, so as to conform to the requirements laid down in the opinion, has the tendency, if not the result, of extinguishing life by the slow process of strangulation. The life of an organization like the defendant society depends upon the activity and energy exerted continuously and at all times by those charged with the duty of administering its affairs. The prolonged litigation in the case at bar can not but have a most depressing effect on the strength and vitality of the organization, and now to suspend its business by an injunction, until a reorganization can be effected, as it appears to me, can but result in seriously impairing, if not altogether destroying, the usefulness and beneficent purposes which, by the judgment, it is intended to preserve. The object and aim of the statute is to regulate the management of the affairs of the society and protect its membership, and not, by injunction, to drive it out of business, except in extreme cases.

Nor do I understand that it is the province of the court to prescribe a designated plan of organization, or reorganization, as a condition of reengaging in business. The

internal affairs of the society and the plan upon which it will conduct its business are matters of concern only for its membership. It can not do business in violation of law. The court can say "thou shalt not," but, however wise and advisable it may seem to the court, it can not very well say: Unless you do business according to certain prescribed methods, which are regarded as best calculated to subserve the interests of the membership, you can not do business at all. I do not understand that a board of directors is indispensable in the management of the affairs of such an organization. The members may, without violating the law, provide for the government of the affairs and the conduct of the business of the society through other agencies and instrumentalities. All the statutes enjoin is a representative form of government.

The majority opinion enjoins the defendant society from doing business until certain errors therein mentioned and found to exist are corrected to the satisfaction of the state auditor. The history of the present case does not, as it seems to me, make appropriate an order of this kind. The auditor is thereby clothed with greater authority than is contemplated by the enactment prescribing his powers and duties. The auditor is a real party in interest in this litigation. The suit was begun at his written request. He prosecutes in the name of the state. The litigation should be as binding on him as on the defendants. The judgment and decrees entered should operate against him as forcibly as against the other parties to the suit. The controversy having been submitted to the court for adjudication, its decrees should definitely fix and determine the responsibilities and duties imposed upon and due to each of the adversaries.

The society is enjoined from doing business until its president shall release all claims for compensation for his services under contracts made with the other executive officers of the organization. Of course, the legality of his demands against the society can not be litigated in this action. He may have just demands against the society.

He may choose to assert the legality of his claim, decline to renounce it, and thus the life of the society is made to depend upon his philanthropy or his avarice, and this, as it seems to me, is not a correct adjudication of the society's right to continue its business.

As expressive of my own views of the matters in litigation, I make the following opinion, prepared by me before this case was reargued, with a view to its adoption as the opinion of the court, a part of my dissenting opinion herein :

The legislature, in 1897, passed a law entitled "An act defining fraternal beneficiary societies, orders or associations, and regulating the same" and to repeal a prior law relating to the same subject. Laws, 1897, chapter 47 (Compiled Statutes, chapter 43, sections 91-112, Annotated Statutes, 6483-6504). Section 106 provides that, upon failure or refusal of any such association to make the report provided for by the act, the association shall be excluded from doing business in the state. It is also provided in the same section, in substance, that in case of the failure to make such report, or when any such society shall exceed its powers, or shall conduct its business fraudulently, or shall fail to comply with any of the provisions of the act, an action may be begun by the attorney general at the instance of the state auditor to enjoin the society from carrying on business; that, when so enjoined, such society shall have no authority to continue in business until such report shall be made, or overt act or violation complained of shall have been corrected, provided it is found by the court that the default charged exists, whereupon the auditor shall reinstate such association, and not until then shall such association be allowed to do business in this state. Acting under the provisions of the above mentioned section and in pursuance of the authority therein given, the attorney general prosecutes the present action in the name of the state, praying in the petition that the defendant society, its officers and agents may be enjoined from further pro-

ceeding with the business of the association; that a receiver may be appointed to take charge of its affairs, and that the same may be wound up according to law. The petition alleges, and it is admitted, that the defendant is a fraternal beneficial society organized under the laws of this state. As grounds for the relief sought, the substance of the allegations of the petition is to the effect: First, that the society has exceeded the powers granted it by its license issued by the state auditor, and that it has conducted its business fraudulently, and has not fully complied with the requirements of the laws of the state; second, that the society is insolvent; third, that it has diverted the funds of the association from the purposes for which contributed, and has paid out the same for the business and membership of other similar organizations; such membership being admitted to the defendant society without medical examination, and beyond the age limit prescribed by statute, and at less rates than charged to the membership of the society generally; fourth, that the law has been violated by withdrawing, without consideration, securities donated and belonging to the society, for the purposes of putting it upon a financial basis so as to continue business; fifth, that false and fraudulent statements of its financial condition for the purpose of deceiving the auditor have been made, and thereby the insurance department was induced to renew its authority to do business in the state; sixth, that the law is violated in that the society has no representative form of government in the management of its business, and that the affairs of the society are not managed by a board of directors but by employees in the interest of its president, who, by this means, controls its affairs; seventh, and lastly, that the society's liabilities have by unlawful means been suddenly and greatly increased and large amounts drawn from its treasury by its president and vice-president in fraud of the rights of its membership. The answer of the society and its officers amounts to a general denial of these several charges of irregularities and noncompliance

with the law. A reference was directed by the court, and the referee, after having taken all the evidence offered by the respective parties bearing on the issues raised by the pleadings, has filed an exhaustive report containing his findings of fact and conclusions of law. On the referee's report, the defendant society asks for judgment in its favor. The state has filed exceptions to certain of the findings of fact, and because other findings were not made, and also to some of the conclusions of law arrived at by the referee. The findings are too voluminous to be incorporated in this opinion, and we must content ourselves by referring only to some of the more important portions thereof with an expression of our own views regarding the particular question under consideration.

While the referee's findings are in the main on all salient points in favor of the society, yet there are several matters in respect of which it is found that the society has failed, in the conduct and management of its business, to comply with certain provisions of the law. Regarding these adverse findings, however, they are not deemed by him sufficient to justify a judgment precluding the society from continuing its business in this state. As a conclusion of law it is held that the several irregularities and illegal practices found to exist can be remedied by enjoining the society and its officers from further permitting or engaging in the same. In this connection it is proper to state here that, in our judgment, it is the policy of the law under which the state is proceeding in this case to regulate the business of fraternal beneficial societies and compel compliance with the law, by enjoining that which may be found to be irregular and illegal, rather than to close up the affairs of a society and drive it out of business. A perpetual injunction or the appointment of a receiver would effectually close up the business of a fraternal beneficial society and terminate its earthly career, and it is not believed that, because it is found there has been a failure in some respects to comply with the law or to conduct the business of the society in all respects in

the manner contemplated and provided by its articles of incorporation, such results should follow unless it is made manifest that, by reason of such irregularities, the society has rendered itself incapable of accomplishing the objects and purposes of its organization. It is, we think, made clear, by a reading of the entire act and especially the section under the provisions of which these proceedings are instituted, that what the legislature intended was that compliance with the law should be required and secured, and the interest and rights of the members and certificate holders protected and subserved. If, says the statute, it is found that there has been a default, that is, a failure to comply with some of the provisions of the statute, such society shall be enjoined until the overt act or violation complained of shall have been corrected, whereupon it shall be reinstated and be allowed to continue its business. We do not mean to be understood as saying that there may not be such violations of, and failure to comply with the law as to be incapable of correction and that, in such case, the society should at least be perpetually enjoined from doing business in the state and, in a proper case, its affairs wound up through the instrumentality of a receivership proceeding. What is said is that, where the errors and irregularities can be corrected and the membership protected, it is the policy of the law to permit the society to continue its business and thus carry out the aims and purposes of its organization. The courts, in such proceedings, will look to the interests of the society at large and to those who comprise its membership, rather than to the legal rights and liabilities of those responsible for the management of the society as they might be fixed and determined when no other rights and interests intervene. The referee has evidently accepted this construction as the proper view of the law and in this our judgment coincides with his.

With reference to the first ground of complaint relating to the alleged wrongdoing by the defendant society in exceeding its authority, conducting a fraudulent business

and in not complying with the law, it may be said that the allegations are of such general character as to be in effect only conclusions of the pleader and, regarding which, a cause of action is not stated. However, the different grounds of complaint are specifically enumerated in subsequent paragraphs of the petition, so that no further notice need be taken of the first ground mentioned.

It is next alleged that the society is insolvent and unable to meet its pending death claims. Around this point nearly all of the evidence centered, and a mass of figures are presented for consideration sufficient to daunt the strongest heart and clearest head. While the question of liabilities for death losses ought, it would seem, to be a simple one and easily ascertainable, as also the amount of the income from assessments from which these liabilities are to be met, yet the society's method of doing its business, and the provisions of its constitution and by-laws as to the extent of its liabilities by reason of death claims, and its apparent reluctance to disclose to the insurance department of the state auditor's office the true state of affairs regarding these matters, has led to unnecessary controversy. The managing officers of the society have, it is manifest, not complied with the reasonable requirements of the insurance department of the auditor's office, and have seemingly failed to appreciate the fact that the supervising authority of the auditor is such as to require perfect frankness and the fullest disclosures of its affairs whenever requested. The chief cause for the difference between the insurance department and the officers of the society has been with reference to the variable amounts for which the society is liable by reason of death claims arising under the provisions found in its constitution, which differ from the amounts called for by the face of the beneficial certificate, unless the insured member has lived the entire period of his life expectancy from the time of his having become a member. It is found by the referee that, by the constitution under which the society is now operating, "from each death benefit payable on account of death

before living out expectancy under American experience tables of mortality, a deduction is made of a sum equal to the amount of one annual premium for each year of the assured's life expectancy, with interest from the date of the policy to the date of death at two and one-half per cent. per annum, less the amounts paid each year into the mortuary fund by said member, together with accumulated interest on the same for the period of his membership at two and one-half per cent. per annum." It is readily seen that, in order to ascertain the amount due to the beneficiary of the certificate holder at the time of death, reference must be had to the state of his account with the society which will show his expectancy at the time of becoming a member, the annual dues or assessments paid, and those which would have become due, had he lived out his expectancy, and from this computation the amount actually due on the benefit certificate is ascertained. More or less litigation has grown out of the constitutional provision referred to regarding the legal effect thereof on certificates issued prior to its incorporation by amendment as a part of the constitution. We have assumed and, for the purposes of this case, shall assume that the society's liability for death losses is to be determined upon a basis of deductions from the face of the certificates according to the terms of such provision, without at all undertaking to prejudge or determine rights of beneficiaries in an action in which they are not parties. It would seem that, ordinarily, such provisions, when legally adopted by amendment as a part of the fundamental law of the society, become binding on all its members, and will govern in all cases in determining the society's liability for death claims accruing thereafter. *Hall v. Western Travelers Accident Ass'n*, 69 Neb. 601. The referee also finds that "The claims for losses reported and received, in 1903, amounted to \$27,300. The amounts collected for deaths and disabilities, in 1903, were \$56,117.81. There was therefore collected, in 1903, the sum of \$28,817.71, for deaths and disabilities in that year, in



excess of what was necessary to pay losses of that character accruing within the same period. From these figures it does not appear that the Bankers Union of the World is in a condition in which it is unable to raise funds with which to meet its liabilities by the assessment of its members. As its revenues as a fraternal beneficial association are, in the nature of its business, to be obtained only from this source, I find that the allegation that this association is insolvent and unable to meet its pending death claims, is not sustained by the evidence." Our own examination of the evidence confirms the correctness of the finding, and from it the result necessarily follows that the charge of insolvency is not supported by the evidence. An examination of the liabilities of the society at the beginning of its business for the year 1903, as shown by its annual report introduced in evidence, and at the close of its business for that year, as shown by the evidence in the case at bar, discloses marked improvement, and the inference is fairly warrantable that, during its last year of business, it has paid considerable more from the assessments collected for death claims occurring during the year than the total amount of losses for the same period, and that with proper management it should be able from its assessments to meet all legitimate demands which have accrued or, in the ordinary course of events, will accrue by reason of death from among its membership. Its revenues are derived from its assessments made upon its members and, with the rate of death loss normally to be expected, it seems to us its receipts are sufficient to meet its liabilities by reason thereof as they mature. It has paid something over \$6,000 during the first half of January of the current year and just before these proceedings were begun. It is true, it has been unfortunate in the number of claims presented and resisted which have been followed by litigation. The explanation of this state of affairs has been adverted to. It does not appear that the society has been unable to meet judgment liabilities when finally adjudicated. It is also obvious that, among the

claims made against the society by reason of death of its members, the aggregate amount of all of which is relied upon by the state to prove insolvency, many are found which are stale and unjust demands, and for the satisfaction of which, the society is not legally liable. It is impossible in this proceeding to distinguish with any degree of accuracy the just claims from the spurious demands. It would therefore be unjust and unfair to the society to say that all of the claims for death losses, which the evidence discloses in this case have been made on the society, are legal liabilities. Upon a consideration of the whole of the evidence relating to the question, we are constrained to say that the society's liabilities for death claims are much less in amount than as contended for by the state. The line of demarcation between solvency and insolvency, when applied to the affairs of a beneficial society such as the defendant in the case at bar, is a difficult question to determine. The assets of the society do not consist of cash in its treasury and property subject to its disposal. It may not have a dollar's worth of property or a cent in its treasury, and liabilities to meet, and yet be solvent. Its assets are in the pockets of its members, to be paid into the treasury by assessments, whenever required to pay liabilities and in accordance with the terms of the contracts under which the assessments are levied and collected. If its plan of operation be such as to warrant the conclusion that it will be able to meet liabilities for deaths as they may reasonably and, under normal conditions, be expected to occur, and to pay the expenses of the management of the business judiciously conducted, then the society may, it seems to us, be said to be solvent. In such case, it would seem that the society has the ability to pay debts as they fall due in the usual and ordinary course of the business in which it is engaged, in which event it would not, in our opinion, be subject to the charge of insolvency. It is observed by the common pleas court of Ohio on the question of the solvency or insolvency of a fraternal beneficial society: .

"An ordinary business corporation is insolvent when it is unable to make payments as usual, or as they mature, or according to the undertaking, or in the ordinary course of business. *Stone v. Dodge*, 96 Mich. 514, 56 N. W. 75. A refusal to make payments does not necessarily mean an inability to pay. The fact that the liabilities of the defendant, at any given time, may exceed the funds then on hand which can be properly used to pay them, does not prove insolvency. The defendant is not required by law to keep enough money in the treasury to meet all the liabilities which may come upon it. It is not required by any by-law to collect the funds till after the liability is incurred. \* \* \* The insolvency of such an association is, therefore, *sui generis*. It is not like that of an ordinary business corporation. It means a condition in which the association is unable to raise the funds, with which to meet the liabilities, by assessment of the members. It is assumed that some of the money to make that fund is either in the treasuries of the subordinate rulings, or in the pockets of the members. Hence, to prove insolvency, it must be proved that the money is neither in the treasuries of the subordinate rulings, nor in the pockets of the members, or, if there, that they refuse to pay it." *Baker v. Fraternal Mystic Circle*, 1 Ohio Dec. 579.

It would serve no useful purpose for us to burden this opinion with a mass of figures elucidating the conclusion we reach regarding the alleged insolvency of the defendant society. It is sufficient to say that, in our judgment, with proper management, and with the costs of conducting the business reduced to a minimum, and the maintenance of the rates as charged in the schedules of assessments, and with liabilities as fixed and determined by the present contracts of insurance, no reasonable ground exists for saying the society can not meet its liabilities in the ordinary and natural course of affairs as they mature, and that therefore insolvency is not proved. We must not be understood as expressing approval or disapproval of the plan adopted by the society in perfecting its organization and carrying

forward the purposes of its creation; nor do we hold that the management of its internal affairs is a subject of judicial control and regulation. We desire only to be understood as saying that, by the application of any accepted test for the determination of the question of the insolvency of a society doing business as a fraternal beneficial organization, it can not be said that the defendant society is insolvent and, for that reason, should be enjoined from further engaging in business, its affairs placed in the hands of a receiver and wound up.

As to the third ground of complaint mentioned in the petition, the evidence discloses, and the referee finds, that the officers of the defendant society, for the purpose of gaining accessions to its membership, have pursued a systematic course eventuating in the consolidation with the defendant society of numerous others organized for like purposes, and that, as a result of this plan of operation and in bringing about such consolidations, the laws governing and regulating the business of fraternal beneficial societies have been disregarded in more than one particular. By the methods adopted and practiced in consolidating different societies, the law requiring admission to membership into a fraternal society upon medical examination, by a competent physician, and also the provision of the statute fixing a limit as to the age of a person who may be admitted as a member, have been violated. It is also disclosed by the evidence, and found by the referee, that, in some instances, where such consolidation has been effectuated, trust funds of the absorbed society have been diverted from the use for which contributed, and used for the purposes of effectuating a consolidation of the absorbed society with the defendant. The referee upon this point finds: "While all the transfers of societies above noted, except the Red Cross of Waverly, Iowa; the Home Guardians of Sterling, Illinois, and the Pioneer Life Association of Luverne, Minnesota, were made under sanction of the insurance department of this state, the evils which inhere in such transfers without authority of law,

have fully justified the auditor's refusal to sanction such transfers. Of these evils, the following are the most conspicuous: There is a temptation to the officers of the absorbed lodges, who receive its funds for disbursement, to use such funds for their own individual advantage. There are, of necessity, members whose health has failed, or who have passed the age of 55, between the date of entry into the transferred order and its transfer to another order. These must either be ignored and their insurance thus destroyed without their consent, or a physical examination must be waived, contrary to the provisions of the statute of the state. Reserves accumulated must be diverted by the transferred society to an improper purpose and thus there must be violated a sacred trust." It is to be said, in this connection, that the insurance department at one time approved of such methods and gave official recognition to the legality of such action. It is also manifest that, as at present organized, the department refused to sanction such action, and that the defendant society, notwithstanding such disapproval, has persisted in conducting its business along these prohibited lines. In the absence of a statute making provisions for and authorizing the joinder or consolidation of different fraternal societies when desired by their membership, so that the two organizations may coalesce, it is evident under our present statute that such results, even though wise and beneficial, can be accomplished only by admitting to membership in the surviving society those alone who have complied with the express requirements of the statute with reference to medical examination, and the age limit, as therein found. It ought not to require discussion or argument as to the inviolability of trust funds held by a beneficial society and the duty of the courts to require their application to the uses and purposes for which contributed. We find no difficulty, however, in respect of the matters last discussed, in bringing our minds to the conclusion that these irregularities and illegal practices may be corrected, and that, by restraining the defendant from a further continuance

thereof, the purposes of the statute will be fully subserved and the rights of the individual membership of the society best protected.

As to the fourth ground of complaint, the referee finds, and the evidence fully supports the finding, that the president of the society, in withdrawing the securities complained of, at the same time paid into the society treasury the fair market value of such securities and that, in this regard, the complaint of the state is ill-founded.

Exception is taken by the state because, as contended, no finding was made by the referee as to the fifth ground of complaint. We are disposed to the view that the several findings of the referee fairly cover and include the issue presented by the paragraph of the petition referred to. In the sixth paragraph of the findings it is found that the reports of the financial condition of the society filed with the state auditor were not full, complete and accurate statements, such as are required by law. In regard to this complaint of the state, it is to be observed that a difference of opinion exists, having a reasonable foundation for its basis, as to the exact nature and scope of the information the financial reports to the state auditor should contain. The reports made to the auditor were not false and fraudulent in the sense that they were intended to deceive the insurance department, and thereby obtain a license and permission to continue a business which was being conducted in fraud of the rights of the members of the society. It is a fraud of this character, as we understand the statute, that is referred to in the section on which this action is grounded. The mere fact that the reports of the society to the auditor did not contain all the information they properly should, does not justify the inference that the society is conducting a fraudulent business, within the meaning of that section. The officers of the society have failed to include in their reports to the insurance department death claims, where the proofs had not been completed to their satisfaction or where, for any reason by them deemed sufficient, the claims were regarded as un-

just, and for the satisfaction of which no legal liability was deemed to exist against the society. It is not to be doubted that all reasonable requirements of the insurance department in regard to disclosures of liabilities, either contingent or fixed, actual or apparent, are to be complied with by every insurance society coming within its jurisdiction. But these requirements, whatever they may be, are of a uniform character, and a general rule in that regard bears upon each society doing a like business in the same way. The statute under consideration specifically requires that, in the annual report to the auditor, information shall be disclosed as to the number of losses or benefit liabilities incurred, and the number and kind of claims compromised or resisted, with a brief statement of the reasons therefor. (Compiled Statutes, ch. 43, sec. 100, Annotated Statutes, 6492.) It is clearly the duty of the proper officers of the defendant society to furnish, in their reports to the insurance department, the information above specified and this includes, of course, every claim for death benefits for which proofs have been furnished in accordance with the rules and requirements of the society, even though it is believed, or as a matter of fact, there do exist good and sufficient reasons for regarding the claim as unfounded, and for the satisfaction of which no liability exists against the society. The conclusion of the referee regarding this phase of the controversy is: "If permitted to do business the Bankers Union, as well as its officers who are defendants in this case and their successors, should be enjoined from withholding information from their reports, and from the auditor of public accounts of this state, of information of the nature indicated, and any other information, or means of deriving information, as to the business and business methods of such Bankers Union of the World, which said auditor may deem necessary." This conclusion is believed to be a correct construction of the law and is therefore confirmed.

As to the sixth ground of complaint, the referee finds as follows: "It is provided by section A, division 3 of the

constitution of the Bankers Union of the World, that the supreme officers of the supreme lodge shall be 9 in number. These, by section C, division 1 of said constitution, are required to be elected by supreme lodge delegates. It is further provided in said section A, as follows: 'There may also be not more than 8 directors elected by said supreme officers. The officials above designated shall together constitute a board of directors, and all the power and authority of the supreme lodge shall, when not in session, be vested in the board of directors, the same as though the said supreme lodge was regularly convened in open session.' It is provided in section B, division 3 of said constitution, that: 'All of said officers of the supreme lodge shall be elected for the term of 2 years, and until their successors are elected and qualified.' The effect of the above provisions is to create a possible board of directors 17 in number, of which board 8 members are to be elected by the executive officers. These 8 directors are not to be chosen by the members of the Bankers Union of the World, nor by the representatives of the said members selected for that purpose." The referee concludes: "The provisions for the appointment of 8 directors by executive officers is entirely nugatory, for the reason that this method of providing directors is in conflict with section 91, chapter 43, Compiled Statutes (Annotated Statutes, 6483), requiring that fraternal beneficial associations shall have 'a representative form of government.' If the Bankers Union is permitted to do business, there shall be an injunction against the appointment, or the recognition of any director appointed by supreme lodge officers." These findings and conclusions are confirmed, and the provisions for the selection of 8 directors by the executive officers is held to be a nullity, and of no force, because violative of the section mentioned, which declares that such societies shall have and maintain a representative form of government in the management of their affairs. While the internal affairs of the society are, except where conflicting with the law, matters of concern



only for the membership of the organization, and are not properly under the control or direction of the courts, it is quite patent to us that a large share of the difficulties which have been incurred by the defendant society arises by reason of its methods of government. It has no directory, in the proper sense of the word, to guide and direct the general management of its affairs. Its directory, as provided for, as has been noted, is clearly in violation of the statute; but even this provision for a directory has not been attempted to be put into practical operation by those purporting to have authority so to do. The management of the affairs of the society, by its membership and under its constitution and by-laws, has been left exclusively within the control of its supreme executive officers. These officers have not only had to do with the general affairs of the society, but, in a measure and in many instances, have dealt with themselves in making contracts in such a way that their personal interests and the interests of the society at large have come in direct conflict, and because thereof, the latter has been the greater sufferer. In this connection it is proper to note that, by the finding of the referee, it is made to appear that, soon after the organization of the society, a sweeping contract was made by those purporting to act in its behalf with its president, the nature of which need not here be discussed, which, because of its objectionable features, was later on abrogated, and in January, 1902, an arrangement was made whereby the president was to receive a stated salary a month, "and commissions at the rate of 5 cents a \$1,000 for single life policies, and 7 and a half cents on joint policies, on all the policies shown by certain books of the Bankers Union designated as A, B and C." The receipt of these commissions ended in June, 1903, after something like \$4,000 had been received under the contract. As a conclusion of law, the referee holds that because of the provisions of section 103, chapter 43, Compiled Statutes (Annotated Statutes, 6495), the Bankers Union of the World had no right to give to its president a commission on its membership al-

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State v. Bankers Union of the World.

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ready secured, and, consequently, if the society is permitted to do business, it should be enjoined from paying, and its president should be enjoined from receiving pay or credit for, commissions to any amount of that character. The conclusion reached by the referee is a correct interpretation of the law and is approved. With reference to the last ground of complaint, the referee finds upon the fullest investigation, and we are disposed to adopt his finding, that the charge made is not sustained by the evidence. The referee finds: First, "From the organization of the Bankers Union of the World, its president advanced various sums to it and for its use. There is in evidence no tabulated statement of the amounts drawn out by him. There is in evidence sufficient data to show that the amounts paid to him as salary, not including commissions, are \$5,015.76. The Bankers Union began business November 14, 1898. The period above contemplated is therefore over 5 years. The net sum he has received as salary is at the rate of less than \$1,000 per annum during the existence of the Bankers Union of the World." And, second, "There was paid the vice-president, the wife of the president of the Bankers Union, for services in 1903, \$50 a month for a short period. She received for the remainder of the year, for editing the official paper of the Bankers Union, \$150 a month. The salary of the president of the Bankers Union, for the year 1903, was \$600 a month. The salaries just referred to I find are not exorbitant."

A consideration of the entire record leads to the conclusion that the defendant society should be reinstated and permitted to continue its business; that such an order will best subserve the interests of its certificate holders, whose rights, we are disposed to view, were the principal object of legislative solicitude in the enactment of the section of the law we have under consideration. In the further prosecution of the business affairs of the society, its executive officers who are made defendants in this action should be restrained from doing those things herein found to be irregular or not in compliance with the requirements

of the law, and from withholding from the state auditor any and all information pertaining to its affairs, showing its financial condition or relating to claims for death losses and disability benefits, whether the liability has been adjusted or in process of adjustment, or whether the claim has been compromised or is resisted, and all other needful and necessary information required by the rules of the insurance department, in the exercise of its supervisory authority over the affairs of insurance societies organized under the law under which defendant is operating.

The costs of the action should be taxed against the defendant society, as by section 106, chapter 43, Compiled Statutes (Annotated Statutes, 6498), is provided shall be done.

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**RICHARD GOULD V. STATE OF NEBRASKA.**

FILED APRIL 21, 1904. No. 13,642.

1. **Trial: ERROR.** In order to predicate error on the fact that the father of a state's witness was permitted, while she was testifying, to sit near her in the court room, it must affirmatively appear that his presence caused her, in giving her evidence, to deviate from the truth, or color her statements to the prejudice of the accused.
2. **Secondary Evidence.** Where it is shown that a note and certain letters written by the accused to, and received by, a child alleged to have been enticed away from her parents by him, have been totally destroyed by her, at his request, and can not be restored or produced, and that she remembers their contents, she may be permitted to give oral evidence of what they contained.
3. **Instructions.** Instructions examined, and *held* to have been properly given.
4. **Evidence.** Record examined, and the evidence *held* sufficient to sustain the verdict.
5. **Sentence.** Where a man of mature years, who is married and has a family of 7 children, is guilty of enticing a girl of 15 years of age away from her parents for an unlawful purpose and in violation of the provisions of section 20 of the criminal code, he being a minister of the gospel and she a member of his church, a sentence of 6 years in the penitentiary is not an excessive punishment for his crime.

**ERROR to the district court for Merrick county: CONRAD HOLLENBECK, JUDGE. *Affirmed.***

*Patterson & Patterson, for plaintiff in error.*

*F. N. Prout, Attorney General, and Norris Brown, contra.*

**BARNES, J.**

At the September, 1903, term of the district court for Merrick county, one Richard Gould was tried and convicted of the crime of child stealing. After his motion for a new trial was overruled, the court sentenced him to imprisonment in the penitentiary of this state for the period of 6 years. To reverse that sentence he prosecuted error to this court, and will hereafter be called the plaintiff.

In the first assignment of error the plaintiff complains because the father of Eva Flint, the child charged in the information to have been stolen or enticed away, was allowed to remain seated near her while she testified on the trial of the case. The plaintiff states no reasons in support of this assignment which in any way appeal to our consideration. The substance of all that is said by him is, that he thinks the father had manufactured testimony in the nature of a family record, which was introduced in evidence as exhibit "A"; and for that reason his being allowed to sit facing his daughter while she was testifying was prejudicial to the plaintiff's rights. A careful examination of the record fails to disclose any improper conduct on the part of the father, and it nowhere appears that the testimony of the daughter was in any way affected by the father's presence.

The plaintiff, by his second assignment, contends that the court erred in allowing the witness, Eva Flint, to give oral evidence of the contents of a note she had received from him the day before they left the state, and certain letters theretofore written by him and received by her.

The only argument made by counsel in support of this contention is, that no sufficient foundation was laid for the introduction of this class of testimony. It appears from the record that the note and the letters in question were written by the plaintiff, and received by the witness; that after she had read them, at his special request, they were totally destroyed by her; so that, as she testified, it was impossible to find or restore them. In addition to these facts, the witness stated that she could remember certain portions of what the note and letters contained. Thereupon she was permitted to state, in detail, such parts of them to the jury as she could remember. It thus appears that a sufficient foundation was laid for the introduction of this evidence, and plaintiff's contention is without merit.

The next assignment of error argued, in substance, is, that the court erred in permitting the witness, Eva Flint, to state that she would not have gone away but for the inducements of plaintiff. The facts constituting these matters of inducement had been properly put in evidence, and after the witness had testified to them in detail, she then stated that, but for them, she would not have left her home with the accused. It was proper for her to state these matters, to give the actions and statements of the accused, and state what effect they had on her. Therefore the court did not err in receiving this evidence.

It is further contended that the court erred in giving the jury his instruction numbered 1, on his own motion. We have examined this instruction, and find that it contains a fair and impartial statement of the charges contained in the several counts of the amended information on which the accused was tried, and informed the jury of the issues presented for their consideration. It is insisted, however, that, because the state elected to rely for a conviction on the third count of the information, it was error for the court to mention the other two counts. We are unable to agree with this contention. It was the duty of the court to advise the jury of the facts charged in the information,

which was fairly and impartially done. This was immediately followed by a direction to them, as follows: "The state having elected to rely upon the third count of the information, the first and second counts are therefore withdrawn from your consideration. Therefore the only questions for your consideration in this case are the allegations contained in the third count of the information."

It thus appears that the statements contained in the first and second counts of the information were entirely withdrawn from the consideration of the jury, and in such a manner that they could not have been misled to the prejudice of the plaintiff by this instruction.

Complaint is also made of the giving of instructions numbered one, two, three and four, asked for by the state. The best way to dispose of these assignments is to consider them separately and in connection with section 20 of the criminal code under which the prosecution took place, which provides as follows: "Any person who shall maliciously or forcibly or fraudulently lead, take, or carry away, or decoy, or entice away, any child under the age of eighteen years, with intent unlawfully to detain or conceal such child from its parent or parents, or guardian, or other person having the lawful charge of such child, shall be imprisoned in the penitentiary not more than twenty years nor less than one year."

By the first of these instructions complained of the jury were told, in substance, that any solicitation, representation or suggestion made to Eva Flint by the accused for the purpose of influencing her to leave her father would, if it actually induced her to go away, be sufficient to make out a case of enticing.

By the second instruction the jury were informed that it was unnecessary for the state to establish beyond a reasonable doubt that it was the intention of the defendant in enticing Eva Flint away, if he did entice her away, to both detain and conceal her from her father; that it was sufficient for them to find from the evidence beyond a reasonable doubt that it was his intention to do either.

And, if they so found, it would be sufficient to make out a case of enticement, with intent, as charged in the information.

By the third instruction the jury were told that, while it was necessary for them to find and determine the intent of the accused, beyond a reasonable doubt, yet in so doing it would be immaterial for them to determine whether Eva Flint joined in said intent or not. In short, the substance of this instruction was, that the intent with which the accused performed the acts complained of, was what should be considered by them, and that the intent of Eva Flint in leaving her home with him was immaterial.

By the fourth paragraph of the instructions the jury were told, in substance, that in order to establish the intent of the accused it was not necessary for the state to show that it was his intent to detain or conceal Eva Flint from her father, against her will. No authorities are cited to prove that these instructions, or any of them, were erroneous. And we are satisfied that there is nothing contained in them which could in any manner prejudice plaintiff's legal rights. They seem to cover the propositions of law involved in the case, and to state fairly to the jury what it was necessary for the state to prove beyond a reasonable doubt, in order to warrant a conviction, under the section of the statutes above quoted.

The next assignment of error is, that the evidence is not sufficient to sustain the verdict. This question seems to be relied on to a greater extent than any of the others, and is argued at considerable length by counsel for the plaintiff in error. The gist of the argument seems to be that the plaintiff and his counsel appear to labor under the impression that because Eva Flint consented to go away with the plaintiff, that he is innocent of the charge of child stealing. To sustain this contention would practically set aside, and hold for naught, the statute under which this prosecution was conducted. It must be borne in mind that the offense of enticing a child away for unlawful purposes, without the use of violence, is entirely sepa-

rate and distinct from the one of forcible abduction. The fact that Eva Flint consented to leave her parents, with the accused, is immaterial. The offense is complete if the accused enticed her away with the unlawful intent, and by holding out hopes of some advantage to her, or by allurements persuaded her to go with him. The word "entice," as used in this statute, must be given its ordinary and usual meaning, which is: To draw on; to instigate by inciting hope or desire; to allure, especially in a bad sense; to lead astray, to tempt, to incite. Its synonyms are: To allure; to coax; to destroy; to seduce; to tempt; to inveigh; to persuade, and prevail on. That the accused, by his statements to Eva Flint, persuaded and induced her to leave her home and go with him for his unlawful purposes, is fully and completely established by the evidence contained in this record.

Lastly, the plaintiff contends that the court should reduce his sentence; that 6 years in the penitentiary is too long a term, and too severe a punishment for the offense committed by him. It appears from the record that the plaintiff is a man of mature years, having a wife and 7 children; that he was pastor of the church of which Eva Flint and her mother were members; that taking advantage of his confidential relations with them as their spiritual adviser, he frequented their home; that Eva Flint was a girl about 15 years old, perhaps a year older, but not exceeding that age; that shortly after the accused commenced his visits to her home he began his attempts to induce her to accompany him to some distant state, and participate with him in his unlawful purposes. It appears that she hesitated to leave her parents, but her hesitations were overcome by his blandishments and promises, together with his pretended solicitude for and care of her; that finally persuaded by his promises she yielded to him, and accompanied him from her home to Aurora in Hamilton county, from thence to Lincoln, from there to Omaha, to St. Paul, Minnesota, to Minot and finally to Williston, North Dakota, where she entered upon a course of illicit



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relations with him, and where they were found living together as man and wife at the time of his arrest. On the trial he offered no explanation of his conduct, and there appears a letter in the record from him to the father of this child in which he acknowledges his guilt. The following is a part of the letter: "My plans were well laid, and I worked while others slept. Some day you will hear from us again. When you get this we will be hundreds of miles from here."

A careful examination of the record in this case satisfies us of the guilt of the accused. With this view of the case we are unable to say that his sentence is too severe. His conduct was so reprehensible that it would shock the sensibilities of the irreligious, even those who are "dead in trespasses and in sin." Such conduct on the part of a minister of the gospel can not be too severely censured. The accused made use of his confidential relation as spiritual adviser of the mother and daughter to frequently visit this family which he has disgraced, and entice from her home this child whose ruin he has accomplished; and in our judgment "the punishment fits the crime," and the judgment of the district court is

AFFIRMED.

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HERMAN MENDEL V. JAMES E. BOYD.

FILED APRIL 21, 1904. No. 13,487.

1. **Witness: VOLUMINOUS ACCOUNTS.** Where a book contains voluminous accounts or transactions, the examination of which could not conveniently take place in court, an accountant, who had made an examination of the book, may testify as to the result of his computation therefrom, but not as to mere inferences.
2. **Drafts: EVIDENCE OF PAYMENT.** Where the question was whether certain drafts had been paid for when issued, an accountant, who had examined the books of the bank, was permitted to testify as to what the books showed in regard to that question: *Held, error.*

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3. ———: AUTHORITY OF CASHIER OF BANK. The general authority of a cashier of a bank does not authorize him to issue drafts of the bank for himself or for his private use.
4. ———: PROOF OF PAYMENT. When it appears that he has thus issued drafts, there is no presumption that they were paid for when issued, and the burden is on the party claiming they were thus paid for to prove it.

ERROR to the district court for Douglas county: WIL-  
LARD W. SLAUBAUGH, JUDGE. *Reversed.*

*John P. Breen and Frank H. Gaines, for plaintiff in  
error.*

*S. R. Rush and Howard B. Smith, contra.*

ALBERT, C.

One, since deceased, while cashier of a state bank in Iowa, embezzled \$18,000 of the funds of the bank. Herman Mendel, the plaintiff in this action, and another were his bondsmen, and made good the shortage. A large portion of the funds thus embezzled were lost by the cashier in gambling on the board of trade, through the defendant who conducted a commission house. The plaintiff by assignment succeeded to the rights of his fellow bondsman in the premises, and brought this action against the defendant for the full amount of the cashier's shortage to the bank. The petition sets forth 19 drafts, aggregating \$21,125, which, it is alleged, were received by the defendant from the cashier in the gaming transactions. Each draft represents a separate transaction, and each transaction is made the basis of a separate cause of action in the petition. The case is here for the second time. The former opinion is unofficially reported, under the present title in 3 Neb. (Unof.) 473, and contains a somewhat extended statement of the facts. The principal question of fact, on the first trial, appears to have been as to the amount which the cashier had received from the defendant in the transactions and returned to the bank. In the former opinion,

reversing the judgment of the district court, BARNES, C. (now judge), said:

"Therefore, in any event, the verdict in this case should have been for the plaintiff. We are satisfied that a verdict for \$3,500 would not have been excessive. For this reason the judgment herein must be reversed."

The evidence on the second trial was the same as that on the first, save that the defendant undertook to show by an expert accountant, that 6 of the drafts had been paid for when issued. The trial resulted in a verdict for the defendant, and judgment was given accordingly. The plaintiff brings error.

As the plaintiff's right to recover on the evidence adduced on the first trial is established by the former opinion, for a justification of the present verdict we must look to the testimony of the expert accountant, which is the only additional evidence adduced on the second trial. One of the principal errors assigned is based on the reception of his evidence. After qualifying as an expert and showing that he had made an examination of the books of the bank, which were in court and identified, the witness was examined as follows:

Q. You may state whether you made an examination of the books of the State Bank of Neola, as to whether or not draft, Exhibit 16, No. 37,848, dated June 1, amounting to \$1,500, was paid for when issued?

A. I have made such examination.

Q. You may state whether or not the entries upon the books of the state bank of Neola, or what they show with respect to the payment for draft Exhibit No. 16?

Objected to on the grounds that the book is the best evidence, and calling for a conclusion. Objection was overruled.

A. The books of the state bank of Neola show that Exhibit 16, draft No. 37,848, for \$1,500, was paid for when issued.

Substantially the same record was made as to the other 5 drafts. It seems to us that this evidence was so clearly

incompetent as to leave little room for a difference of opinion. One of the elementary rules which governs in the production of evidence is that which requires the best evidence of which the case in its nature is susceptible. That a book itself, ordinarily, is the best evidence of its contents will be conceded. The foregoing rule has been relaxed where the book contains complicated or voluminous accounts or transactions, the examination of which could not conveniently take place in court. In such cases it is the practice to permit an accountant, who has made an examination of the book, to state the result of his computation therefrom. 1 Greenleaf, Evidence (13th ed.), sec. 93; 12 Am. & Eng. Ency. Law, sec. 2, p. 428. But, in the present case, the question was whether the 6 drafts, or any of them, had been paid for when issued. This involved only 6 transactions, simple in their nature. The entries, which the defendant relied upon as showing such payment, should have been pointed out, and the question of what they showed left to the jury. If the entries were made in technical language, or were ambiguous, there is no doubt they might have been explained by any witness having shown himself competent to make the explanation. But to permit a witness to examine such entries, and then give in evidence the inferences which he drew therefrom was clearly improper. Whether the book itself would be admissible in evidence to prove or disprove such payment, in an action between the present parties, is a question that is not necessarily presented by the record.

One paragraph of the charge to the jury, and which is the basis of another assignment of error, is as follows:

"1st. Whether or not the drafts, Exhibits 1, 2, 13, 14, 15 and 16, or any of them, of the Neola State Bank, were paid for on their issuance, and the burden is upon the plaintiff to establish by a preponderance of evidence that said drafts were not paid for."

The 6 drafts mentioned in the foregoing instruction are the drafts which the defendant undertook to show by the expert had been paid for when issued. Some of them were

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signed by the cashier whose peculations gave rise to this action; the others, by the assistant cashier; all of them, however, were issued by the cashier himself. It is well settled, that the general authority of the cashier of a bank does not authorize him to issue drafts of the bank for himself, or for his private business. *Lee v. Smith*, 84 Mo. 304, 54 Am. Rep. 101; *Anderson v. Kissam*, 35 Fed. 699; *Lamson v. Beard*, 36 C. C. A. 56, 45 L. R. A. 822; *West St. Louis Savings Bank v. Shawnee County Bank*, 5 Otto (U. S.), 557. This rule is founded on the familiar rule of the law of agency, which forbids that an agent shall act for himself and for his principal in one and the same transaction. It is founded on sound considerations of public policy, and the recognized inability of any person to faithfully serve two masters at the same time. Consequently, when the cashier issued these drafts, he did so without authority, and his conduct is to be viewed in no more favorable light than that of any other person who, without authority, appropriates the property of another to his own use. Such appropriation is commonly called conversion, sometimes by a harsher term, and where it is shown, as in this case, there is no presumption that the wrong-doer has paid value or made restitution, the burden is upon those claiming that he did to prove it. There may be a question whether the plaintiff, by the evidence adduced in making his case, did not commit himself to the theory that the burden was on him to show that the drafts had not been paid for when issued. But as the case must be remanded for a new trial on other grounds, it was thought best to deal with the instruction as an abstract proposition, rather than as it stands related to the theory on which the case was tried.

For the errors pointed out, it is recommended that the judgment of the district court be reversed and the cause remanded for further proceedings according to law.

FAWCETT, C., concurs.

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GLANVILLE, C.

I concur in the conclusion but not in the holding announced in paragraph 2 of syllabus.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is reversed and the cause remanded for further proceedings according to law.

REVERSED.

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FRED KRUG BREWING COMPANY ET AL. V. PETER HEALEY.\*

FILED APRIL 21, 1904. No. 13,317.

1. **Petition.** Petition examined, and *held* to state a cause of action.
2. **Conversion: ATTACHMENT: JUDGMENT.** In an action for conversion of property taken from the possession of plaintiff, where defendants justify under an order of sale of attached property upon judgment against plaintiff's vendor, defendants must, at all events, show a valid judgment in the attachment case before he can question plaintiff's title.
3. **Plea of Res Judicata.** In such action, a plea of *res judicata* against plaintiff's title is not sustained by proof that plaintiff, who was made defendant in the attachment case, but against whom no judgment was rendered therein, had moved to discharge the attachment and his motion had been overruled. *Kimbro v. Clark*, 17 Neb. 403.
4. **Evidence: MOTION TO STRIKE.** A motion to strike out certain evidence of proceedings in such attachment case, *held* properly sustained, when the evidence was closed without proof of the affidavit, writ, levy of the writ, or final judgment therein having been offered.
5. **Verdict: No ERROR.** Where the verdict found is the only one proper under the pleadings and evidence, so that it should have been directed by the court upon the motion made, there is no prejudicial error in the manner in which the case was submitted to the jury.

ERROR to the district court for Cuming county: GUY T. GRAVES, JUDGE. *Affirmed.*

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\* See opinion on motion for rehearing, p. 667, *post*.

*Charles F. Tuttle and Allen & Reed, for plaintiffs in error.*

*P. M. Moodie, A. R. Olson and A. G. Burke, contra.*

GLANVILLE, C.

The defendant in error commenced an action in the district court for Cuming county against the plaintiffs in error to recover for the conversion of a stock of saloon goods and some saloon fixtures, and had judgment. Three petitions in error are filed, containing 54 assignments each, but they are identical except that one is a joint petition by the plaintiffs in error and the others are their separate petitions. Under the pleadings and evidence, both, if either, are liable, and the case will be discussed upon this theory. In the condition of the record and the contentions of parties, it would be very difficult to make a full connected preliminary statement of the case without making it unreasonably long, and we prefer to make the necessary statement in connection with the contentions as we discuss them.

The first contention is that the petition does not state a cause of action, and the point, if good, is saved by the record. Much argument in the briefs is made on this point, but it is not worthy of extended discussion. The petition shows that the defendant in error was in possession of the property involved; that he had a special ownership therein by virtue of a bill of sale, a copy of which is set out; that the bill of sale was given to him as security for \$180 lent to the owner of the property who gave the bill of sale, which was past due and unpaid, and also to indemnify him as surety for such owner upon notes amounting to \$800 which he had been compelled to pay, and no part of which had been repaid to him. Copies of the notes are set out showing that they were past due. It alleges an unlawful and wrongful taking and conversion of the property by the plaintiffs in error. The petition is sufficient.

Plaintiffs in error answer jointly, and admit the existence of the bill of sale, but allege that the bill of sale was fraudulent and made for the purpose of defrauding the creditors of Fred Kruger; that it was made March 17, 1901, and not placed upon record until the 22d day of that month; that the defendant in error took possession of the saloon and fixtures on that day; "that becoming heavily indebted to various creditors, among others, the Fred Krug Brewing Company, the said Kruger" made the bill of sale in question, and that defendant in error placed it on record and took possession "for the purpose and with the intent of hindering, delaying and defrauding the said creditors." They then attempt to plead *res judicata*, and their plea may be summarized as follows: They allege that, in an action in the county court wherein the Fred Krug Brewing Company was plaintiff and Fred Kruger and the defendant in error were defendants, the defendants therein moved the court to dissolve an attachment; that upon the hearing of the motion, defendant in error appeared in person and by attorney; that evidence was taken upon the motion to discharge the attachment; and that the motion was overruled. As a further statement of such plea, we quote from the answer as follows:

"For further answer the defendants show to the court that, upon a final hearing in said cause, upon evidence and argument submitted to said court, all the issues now brought and sought to be made in this pretended present action were adjudicated, and it was ordered and adjudged by the county court that the said pretended bill of sale was fraudulent and void, and conveyed to the said Healey no right, title or interest, in or to the goods and chattels, herein described, and it was further ordered that said Felix Gallagher, as such sheriff, sell the said goods, as the goods of said Fred Kruger, to satisfy a debt therein adjudged to be due and owing the said Fred Krug Brewing Company." They then alleged that the property in question was sold by virtue of an order of sale issued in that action; that "the said Felix Gallagher justifies his acts in



that regard under a valid and sufficient proceeding of said court in said cause," and that no appeal or error was prosecuted from the county court. The reply is a general denial. No other or more specific allegation of any indebtedness or final judgment than those above quoted are found in the answer.

The record in this case is in a very unsatisfactory condition. A great mass of exhibits in the way of letters, telegrams, checks, notes, bills, receipts, affidavits and orders, some 75 in number, are found in the bill of exceptions, with no index to help in finding what is material for us to consider. We have examined the record in regard to each of the 54 assignments of error, and find no one of them sustained in the view we take of the case, and a discussion of them in detail would be of no value to the profession.

One of the main contentions is in regard to the plea and proof of *res judicata*. It is contended by the plaintiffs in error that the court erred in not submitting this question to the jury upon proper instructions. We think there was no error in this regard. The plea that the rights of the parties had become *res judicata* by the overruling of a motion to discharge an attachment is bad under the ruling in *Kimbrow v. Clark*, 17 Neb. 403. In that case, a husband being sued in attachment, the wife intervened and claimed title to the attached property, and it was held that, upon creditors' bill against the wife to subject the property, a judgment against the husband and an order that the attached property be sold will not debar the wife from claiming title, notwithstanding such intervention. Moreover, the pleadings in this regard were not sufficiently shown, if such a plea were good. The original affidavit for an attachment was not offered, and therefore the grounds alleged for the attachment are unknown. The motion to discharge was made on the grounds: "1st. Because the facts stated in the affidavit are not sufficient to justify the issuing of the same. 2d. Because the statement of facts in said affidavit are untrue." The ruling upon the motion is:

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"The court finds that defendant has not presented sufficient proof to sustain his motion to dissolve said attachment, and that motion should be overruled. Motion is overruled." The record is insufficient to show an adjudication of defendant in error's claim or title.

After spending much time in analyzing the record, we are confident that the only verdict that could properly be rendered upon the pleadings and evidence is the one found by the jury. The plaintiffs in error sought to justify under an attachment and order of sale. They have failed in their evidence in this regard, even if all that was offered were received. No affidavit for attachment was shown, no writ of attachment was offered, no levy was pleaded or proved; in fact, what was offered as a return to the writ is only an inventory and appraisalment, and Gallagher's testimony shows that he broke into the building and took possession of the property by direction of the brewing company's agent, in the absence of the defendant in error, and it almost conclusively shows that no valid levy was made. Again, no final judgment in the attachment is pleaded, and no proof of any such judgment was offered, outside the recitals of the order of sale, and such recitals show that the action against defendant in error was dismissed. Such recitals are insufficient in such case to prove judgment, if one were well pleaded, which is doubtful. Section 127 of the code reads:

"In pleading a judgment, or other determination of a court or officer of special jurisdiction, it shall be sufficient to state that such judgment or determination was duly given or made. If such allegation be controverted, the party pleading must establish, on the trial, the facts conferring jurisdiction."

Complaint is made because, after the evidence was closed, the court struck out all that had been introduced showing what had been done in the attachment case. This was proper when no proof of the affidavit, writ, levy of the writ, or final judgment had been offered. The court should have instructed a verdict for the defendant in error. The

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jury having found such a verdict, the judgment thereon should be affirmed.

We therefore recommend that the judgment of the trial court be affirmed.

FAWCETT and ALBERT, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is

**AFFIRMED.**

The following opinion on motion for rehearing was filed November 16, 1904. *Motion denied; and motion and brief stricken from files:*

1. **Conversion: PETITION.** One who has possession of personal property, claiming a lien thereon, may maintain an action for conversion against one who wrongfully attaches the property. It is not necessary, in such case, to set out in the petition the particulars of his lien.
2. **Chattel Mortgage: FRAUD: PRESUMPTION.** The presumption of fraud which the statute raises against a mortgagee who fails to take immediate possession of the things mortgaged, is not available to one who attaches the property after the mortgagee has taken it and while he has actual possession thereof under his mortgage.
3. **Attachment: RES JUDICATA.** A ruling made upon a motion to dissolve an attachment is not *res judicata* of the facts involved therein, as against one who, though a party to the proceedings at the time of the ruling, is dismissed therefrom by the final judgment entered in the action.
4. **Briefs.** The court will, on its own motion, strike from the records a motion and brief which contain personal criticisms of a commissioner of this court, and of his character and motives in the performance of his official duties.

BY THE COURT: Upon the motion for rehearing in this case it is contended:

1. That the petition was insufficient because it failed to allege the particulars in regard to the mortgage lien; but, in the argument upon this point, the plaintiffs in error have overlooked the fact that the petition alleges that the

plaintiff below had possession of the property at the time of the attachment, which constitutes the act of conversion complained of. One who is in possession of property claiming a lien thereon may maintain an action of conversion against one who wrongfully attaches the property.

2. It is contended that the commissioner has not recognized the statute which provides that a chattel mortgage shall be presumed to be fraudulent, unless the same be accompanied by an immediate delivery, and be followed by an actual and continued change of possession of the things mortgaged. But here again the fact is overlooked that the petition alleges, and the preponderance of the evidence shows, that the mortgagee had taken actual possession of the property before the attachment complained of. Under such circumstances, there is no presumption of fraud against the mortgagee in favor of an attaching creditor. *Chaffee v. Atlas Lumber Co.*, 43 Neb. 224.

3. It is also contended that the defense of *res judicata* was established upon the trial. This defense is predicated upon the ruling of the court in the attachment proceedings refusing to dissolve the attachment, but as the attachment proceedings were ancillary only to the main action, and the plaintiff Healey was dismissed from the action by the final judgment rendered therein, the ruling upon the motion to dissolve the attachment would not be *res judicata* as to him. Such ruling does not become *res judicata*, unless it is necessarily involved and confirmed in the final judgment in the case. It was therefore unnecessary to determine what effect it would have had upon the rights of the parties in the property if the defendant Healey had been a party to the final judgment.

4. It is asserted in the brief upon the motion for rehearing that the issues involved in the case are not correctly stated in the opinion, but there is no merit in this assertion.

5. There are in the brief unjust, querulous and unfounded criticisms of the reasoning and the motives of the commissioner who wrote the opinion. These criticisms are

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of so personal and offensive a nature as to call for an expression of disapproval on the part of the court. The commissioners are officers of the court. They are called upon by the laws of the state to perform important and arduous duties in the transaction of the business of the court. They are entitled to the same confidence and respectful treatment that is accorded to the court itself. The brief itself is not fit to remain upon the records of the court. The counsel for the plaintiffs in error have gone so far as to insert offensive expressions in the motion itself. In addition to this, and as above pointed out, there is no merit in the motion. It is therefore ordered that the motion for rehearing and the brief filed thereon be stricken from the records of the court.

MOTION DENIED; AND MOTION AND BRIEF STRICKEN  
FROM FILES.

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STATE OF NEBRASKA, EX REL. SCHOOL DISTRICT, v. JOSEPH  
SAMS, VILLAGE CLERK.

FILED APRIL 21, 1904. No. 13,537.

1. **Act Constitutional.** The provisions of section 28, chapter 80, Compiled Statutes, are not in conflict with section 5, article 8 of our constitution. *Kas v. State*, 63 Neb. 581, followed.
2. **Title to Act: REPEAL.** Where the title to an act states a general subject, coupled with a proposed repeal of laws not within such general subject, the act will be held void as to such attempted repeal, when it is clear that the provisions for the repeal were not the inducement to the general provisions of the act. *State v. Lancaster County*, 17 Neb. 85.
3. ———: ———. The title of an act approved April 1, 1899, is "An act to provide for the registration, leasing, selling and general management of the educational lands of Nebraska, to provide for the collection of rental, interest and principal payments thereon, and for the distribution of the funds arising therefrom; and to repeal chapter 80, Compiled Statutes of 1897." The act, in terms, repeals the chapter referred to, but reenacts certain sections

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thereof, the subjects of which are not within its title. *Held*, That such sections continue in force.

4. **Mandamus: ANSWER: DEMURRER.** A demurrer to the answer to a writ of mandamus will be overruled, if the writ fails to show refusal or neglect to perform an official duty, the act demanded not appearing either by the writ or answer to be a duty of the respondent.
5. **Dismissal.** In such case, it is not error for the trial court to dismiss the action and render judgment against relator for costs, upon overruling such demurrer, when no offer or request for leave to amend the writ is made.

ERROR to the district court for Saunders county:  
SAMUEL H. SORNBORGER, JUDGE. *Affirmed*.

*J. L. Sundean*, for plaintiff in error.

*Simpson & Good*, *contra*.

GLANVILLE, C.

The relator brought mandamus to compel respondent to pay over to it one-half of the sum of \$1,000 for saloon licenses in the village of Colon in Saunders county. The territory included in the corporate limits of such village is comprised within two school districts, the relator and one other. The respondent's answer to the writ set up the defense that, by the last school census, the number of children of school age in the relator district is shown to be 23, and that of the other district 56, and that therefore, under the law, the relator was entitled to but \$291.15 which the respondent was ready and willing to pay upon demand. The relator demurred to the answer and return. The district court overruled the demurrer and gave judgment dismissing the action at relator's cost. The relator brings the cause before us upon the following assignments:

"1. The court erred in overruling demurrer to the defendant's answer. 2. The court erred in rendering judgment for defendant, denying the writ of mandamus on the pleadings without testimony. 3. The judgment is not sustained by the evidence. 4. The judgment is contrary to

law. 5. The court erred in overruling plaintiff's motion for a new trial."

It is contended that the return is demurrable because section 28, chapter 80 of the Compiled Statutes of 1903, upon which the sufficiency of the answer depends, is not the law for two reasons: first, because it is directly contrary to certain provisions of the constitution; and, second, because this section having been a part of chapter 80 of the Compiled Statutes of 1897 at the time of the passage of the act of 1899, entitled "An act to provide for the registration, leasing, selling and general management of the educational lands of Nebraska, to provide for the collection of rental, interest and principal payments thereon, and for the distribution of the funds arising therefrom; and to repeal chapter 80 of the Compiled Statutes of 1897," was repealed by such act; and it is contended the reenactment of the section in question, as section 28 of the new act, was unconstitutional, the section not being germane to the subject, nor within the title of the new act. The section is as follows:

"In cities and villages whose corporate limits form, in whole or in part, more than one school district, all money derived from fines, penalties and licenses, shall be apportioned to the several districts in proportion to the number of persons of school age residing in each district, included in whole, or in part in said corporate limits, according to the school census taken last before any such apportionment." The first reason urged for holding it invalid is disposed of in the case of *Kas v. State*, 63 Neb. 581, where the identical question was raised. The decision in that case sustaining the statute is satisfactory, and we adhere to the ruling without further argument.

Chapter 80 of the Compiled Statutes of 1897 is divided into four articles, and is made up of chapter 71 of the session laws of 1897, the title being "An act to amend chapter 80, of the Compiled Statutes of 1895, relating to school lands and funds, to prevent the further sale of school lands, and to repeal said original chapter 80, Com-

piled Statutes of 1895." Article I contains provisions prohibiting the sale of school lands, providing for abstracts, appraisements, reappraisements, payment for and removal of improvements, payments of interest and principal on old contracts, and general provisions in regard to the leasing of school lands, collection of rentals, and the investment of the funds. Article II, entitled "School Funds," contains the provisions of an act of 1869, covering unclaimed fees and costs, and fines and penalties, into the school fund; an act passed in 1895 containing the section in controversy; an act contained in the general statute of 1873, providing for the payment of what is known as the 5 per cent. fund received from the United States into the school fund; an act of 1877, authorizing suits for the collection of securities held for investments belonging to the school fund; an act of 1879, providing for turning moneys collected upon judgment in favor of the state into the school fund; and an act of 1887, providing for stamping bonds belonging to the permanent school funds so as to show to what they belong. Article III contains the provisions of an act of 1879, providing for refunding taxes paid upon school land. Article IV contains laws enacted in 1875, 1877 and 1879 as amended in 1897, together with a clause repealing chapter 80 of the Compiled Statutes of 1895. The act of 1899 in its new provisions covers the entire subject contained in article I of the act of 1897; reenacts all the sections in article II; omits all of articles III and IV, and repeals chapter 80 of the Compiled Statutes of 1897, and all acts in conflict with the new act.

The theory upon which we are asked to hold the law invalid is that its subject is not included within the title; that the act of 1899 was not an amendment to chapter 80, but was the enactment of a new and independent statute covering a part only of the ground covered by the old chapter, and that all of the reenacted provisions that are not within the title are wiped out by the repeal, notwithstanding the attempted reenactment. We think there are at least two theories, either of which would sustain the



statute in question. One is that the importance of the laws that would be thus wiped out is so obvious and great as to indicate that their retention was a part of the inducement to the passage of the act as framed, and that, if they can not be sustained as a part thereof, the entire act must fall with them, and the law stand as theretofore. The second is, that if the subject matter of these sections is so foreign to the title of the act as to render their reenactment void for this reason, then the act is in part bad, because to repeal numerous acts of the legislature, the subjects of which are not germane to the main title of the act in question, makes the act cover more than one subject, that is, the object stated in the title, and the provision in the bill for the repeal of the entire chapter 80, covers a subject foreign to the main subject disclosed by the title. The result of this would be to allow the act, in so far as it enacted provisions covering the entire subject previously embraced in article I of chapter 80, to stand as a new, complete act, and, by implication, repeal the provisions of article I, in so far as they are in conflict therewith, and to hold the positive repealing clause of the entire chapter void, and yet not an inducement to the act, because the intention to preserve the provisions of article II by an attempted reenactment would show that their repeal was not an inducement to the other part of the act. Either of these theories, if adopted, defeats the contention of the relator, but they would have different effects upon other portions of the law. The adoption of the first theory would reinstate the provisions of article I, which were intended to be changed, and also the provisions of articles III and IV, which were intended to be wiped out by the act. The adoption of the second theory would substitute the new provisions for such article, continue article II, and reinstate articles III and IV. This second theory is practically the one adopted by this court in *State v. Lancaster County*, 17 Neb. 85, where it is held: "A provision in an amendatory act repealing an act not connected with the subject of the amendment is void." The case involved

chapter 80 of the Compiled Statutes as it then existed. The title of the act involved in that action showed that its subject was to amend article I, and to repeal article III of this chapter, and the repealing clause repealed articles I and III. After discussing the case and concluding that the act embraced more than one subject, it was found that the second subject, that is the repeal of article III, was not an inducement to the passage of the act, and that it is possible to determine which part of the act might stand. It is said in the opinion:

"That portion of the act, therefore, by which it was sought to repeal the act which took effect February 20, 1879, for the repayment of taxes levied on lands the legal title of which is in the state is not repealed. Except where a statute is amended, and the statute as it existed prior to the amendment repealed, a law not connected with the subject of the act amended can not be repealed by a provision in the nature of a rider upon an independent act. The attempted repeal is therefore a nullity."

Whether or not it is possible to adopt a theory which will hold in force the reenacted provisions which were contained in article II of the chapter in question, and at the same time sustain the repeal of articles III and IV of the chapter, is not raised in this case. The effect of the act of 1899 upon articles III and IV will be determined when a case arises calling for such determination.

We now turn to the other contention, that the court erred in giving judgment against relator upon overruling its demurrer to the return. It is well established that a demurrer to a pleading searches the entire record, and that judgment should go according to the case made by such record. In section 493 of High, Extraordinary Legal Remedies (3d ed.), it is said:

"The familiar rule of pleading, that a demurrer reaches back to the first fault committed by either party, applies with especial force in cases of mandamus. On demurrer to the return, it is therefore competent for the respondent to avail himself of any material defect in the alternative

writ, \* \* \* the demurrer being carried back to the first defective pleading." *People v. Ransom*, 2 N. Y. 490; *Commercial Bank v. Canal Commissioners*, 10 Wend. (N. Y.) 25, and *State v. McArthur*, 23 Wis. 427, are referred to as sustaining the text.

In *Commercial Bank v. Canal Commissioners*, *supra*, it is said:

"Upon referring to the mandamus, as set out in the record, it shows no right in the relators whatever to the money which the writ commands these defendants to pay. Perhaps it was sufficient in this case, in the writ, to refer to the order and assignment annexed to the affidavits on file, to ascertain *what* the defendants were required to pay; but the facts showing *why* they ought to pay that sum, should appear in the writ, clearly and distinctly; so that the facts there alleged might be admitted, or traversed. *Peat's Case*, 6 Mod. Rep. (Eng.) 310; *Re v. College of Physicians*, 5 Burr. (Eng.) 2742. It may sometimes be allowable to refer to extrinsic facts to ascertain precisely what is claimed in a suit; but the reasons why it is claimed must always appear upon the record, to enable the court to judge of their validity. As the mandamus was defective in substance, I am satisfied that judgment was properly given for the defendants on the demurrer to the return."

In section 493 above referred to it is said:

"So when the alternative writ is defective in not showing that the act which it is sought to coerce is the specific duty of the officer at whose hands its performance is required, a demurrer to the return will be sustained as a demurrer to the writ itself."

This rule is sustained in *State v. McArthur*, *supra*. In the case before us, the writ is defective in that it recites a demand for one-half of the fund in question, without pleading facts which under the law show that it is entitled to one-half, or to any other specific or particular portion thereof. Before a relator is entitled to a writ against a public officer to compel the performance of some

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"The court finds that defendant has not presented sufficient proof to sustain his motion to dissolve said attachment, and that motion should be overruled. Motion is overruled." The record is insufficient to show an adjudication of defendant in error's claim or title.

After spending much time in analyzing the record, we are confident that the only verdict that could properly be rendered upon the pleadings and evidence is the one found by the jury. The plaintiffs in error sought to justify under an attachment and order of sale. They have failed in their evidence in this regard, even if all that was offered were received. No affidavit for attachment was shown, no writ of attachment was offered, no levy was pleaded or proved; in fact, what was offered as a return to the writ is only an inventory and appraisalment, and Gallagher's testimony shows that he broke into the building and took possession of the property by direction of the brewing company's agent, in the absence of the defendant in error, and it almost conclusively shows that no valid levy was made. Again, no final judgment in the attachment is pleaded, and no proof of any such judgment was offered, outside the recitals of the order of sale, and such recitals show that the action against defendant in error was dismissed. Such recitals are insufficient in such case to prove judgment, if one were well pleaded, which is doubtful. Section 127 of the code reads:

"In pleading a judgment, or other determination of a court or officer of special jurisdiction, it shall be sufficient to state that such judgment or determination was duly given or made. If such allegation be controverted, the party pleading must establish, on the trial, the facts conferring jurisdiction."

Complaint is made because, after the evidence was closed, the court struck out all that had been introduced showing what had been done in the attachment case. This was proper when no proof of the affidavit, writ, levy of the writ, or final judgment had been offered. The court should have instructed a verdict for the defendant in error. The

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jury having found such a verdict, the judgment thereon should be affirmed.

We therefore recommend that the judgment of the trial court be affirmed.

FAWCETT and ALBERT, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is

**AFFIRMED.**

The following opinion on motion for rehearing was filed November 16, 1904. *Motion denied; and motion and brief stricken from files:*

1. **Conversion: PETITION.** One who has possession of personal property, claiming a lien thereon, may maintain an action for conversion against one who wrongfully attaches the property. It is not necessary, in such case, to set out in the petition the particulars of his lien.
2. **Chattel Mortgage: FRAUD: PRESUMPTION.** The presumption of fraud which the statute raises against a mortgagee who fails to take immediate possession of the things mortgaged, is not available to one who attaches the property after the mortgagee has taken it and while he has actual possession thereof under his mortgage.
3. **Attachment: RES JUDICATA.** A ruling made upon a motion to dissolve an attachment is not *res judicata* of the facts involved therein, as against one who, though a party to the proceedings at the time of the ruling, is dismissed therefrom by the final judgment entered in the action.
4. **Briefs.** The court will, on its own motion, strike from the records a motion and brief which contain personal criticisms of a commissioner of this court, and of his character and motives in the performance of his official duties.

BY THE COURT: Upon the motion for rehearing in this case it is contended:

1. That the petition was insufficient because it failed to allege the particulars in regard to the mortgage lien; but, in the argument upon this point, the plaintiffs in error have overlooked the fact that the petition alleges that the

commissioner to view and, if in his opinion the public good required, to locate said road, was appointed at said session, and "the county clerk directed to issue a commission to him requiring him to examine the route, after giving public notice of the date when he will make said examination, and to report his action to the county clerk within 20 days after the plan of survey." July 1, 1872, the commissioner made his report to the effect that, after a view of the proposed road, being of the opinion that the public good required its establishment, he proceeded to lay out, mark and plat the same according to law. A plat and field notes of his survey are attached to this report. We do not find in the record any order of the board establishing the road as recommended by the commissioner, but the road appears to have been opened some time in the year 1872 and used more or less from that date down to 1879 or 1880. The road, as recommended by the commissioner, includes the tract of land involved in this controversy, which is a strip 4 rods wide running east from the section line between sections 29 and 30 to intersect with what is known as the Nehawka road. Some time about 1879, Alfred Kime, who then owned and was living upon the premises, gave a right of way at some distance south of the disputed premises, connecting the Nehawka road with the section line road between sections 29 and 30, and this south or "old road," as it is called in the record, was used by the public from 1879 up to 1896, when Michael G. Kime, who was then occupying the premises, fenced this right of way and attempted to prevent further public travel thereon. The old road was closed for about 2 weeks, when it was reopened and the public used the same until April, 1900, when Kime again closed it, whereupon the board of supervisors ordered the road as originally surveyed and located opened. A resurvey was made, the road opened to public travel, and the injunction is sought against what is claimed to be a continuing trespass. From 1879 up to April, 1900, the strip in dispute was not used or traveled as a public highway, and was enclosed and cultivated by the appellees and

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their ancestors. We do not think it necessary to discuss the numerous questions raised by the parties in their briefs. The district court found that no damages were awarded to Kime for the land taken for this road, and we think the evidence amply sustains that finding. There is no record of the appointment of any appraisers to assess the damages, and no record of damages having been paid. In fact, no evidence of any kind appears relating to the appraisal or payment of damages. If this road had been opened and used by the public as a highway for 10 years or more, then the regularity and validity of the proceedings in establishing the same would not be examined. *Lydick v. State*, 61 Neb. 309. The public, however, ceased to use the premises as a road not later than 1879, and from that time up to April, 1900, the owner of the land has been in the exclusive possession. In this state, the county can not take possession and use land as a highway without assessing and paying or providing for the payment of damages to the land owner. This has been established by a long course of decisions. *Livingston v. Board of County Commissioners of Johnson County*, 42 Neb. 277; *Hodges v. Board of Supervisors of Seward County*, 49 Neb. 666; *Propst v. Cass County*, 51 Neb. 736; *Lewis v. City of Lincoln*, 55 Neb. 1.

It is urged by the appellees that the elder Kime dedicated the land in controversy as a public highway. The only evidence of such dedication is contained in the testimony of one Griffith who petitioned for the road in controversy. He says that he had a talk with Kime about the time of circulating the petition for the road, and that Kime told him that he desired the road to run along the section line between 29 and 30 until it reached the bluff, and there turned and run east until it intersected the Nehawka road, and that following this direction the petition was prepared as requested by Kime. There is nothing in this to indicate that Kime intended to give away his land or to waive damages for its taking. The fact that he desired the road to run across his land at the foot of the

bluff, instead of a point lower down, is no argument in favor of the theory that he intended to make a donation of the land necessary for the road. Because the county has not had the damages appraised and made provision for its payment, and because the evidence fails to establish the use of the highway in question for a sufficient length of time to give the county a prescriptive right thereto, we recommend that the decree of the district court be reversed.

LETTON and KIRKPATRICK, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the decree of the district court is reversed and the cause remanded for further proceedings in accordance with this opinion.

REVERSED.

The following opinion on rehearing was filed October 20, 1904. *Judgment of reversal adhered to:*

**Eminent Domain: WAIVER.** Under the constitution of 1866, as well as that of 1875, mere passive acquiescence by a land owner in the taking of his property for a public use, unaccompanied by any conduct indicative of an affirmative assent thereto, and not continued for the statutory period of limitations, is not a waiver of his right to compensation therefor and can not be made so by statute.

AMES, C.

This case is before us upon a rehearing from a former decision prepared by Mr. Commissioner DUFFIE and concurred in by Messrs. Commissioners KIRKPATRICK and LETTON. Upon a reexamination of the record, we do not find that in the preparation of the former opinion anything of importance was overlooked, or that the commissioners or court fell into any error. We do not think it incumbent upon us to repeat the recital of facts contained in the former opinion. There are two vital matters disclosed thereby upon which the conclusion is based, both of which, we think, are justified by the record. The first is that no



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damages were appraised, or provision made for their payment, before or at the time of the attempted establishment of the alleged public road in controversy. Under the constitution of 1866 (article I, section 13), as well as under that of 1875 (article I, section 21), such omission defeated the alleged right to appropriate the land to a public use. If, as counsel for appellees contend, the statute of 1866, under which the proceedings were had, contemplated that the right of the landowner should be treated as waived, by failure to demand compensation before or at the time of the taking, we are of opinion that to that extent the enactment was void. If the legislature could rightly require of the landowner one affirmative and initiatory act, as a condition precedent to obtaining damages, they might require of him any other, or a series of acts which might be difficult or onerous or, in some circumstances, impossible of performance, and so the constitutional guaranty might thus be seriously impaired or wholly frittered away. We are of opinion that the spirit, if not the letter, of the constitution requires that the public seeking to appropriate private property to its use should, unless damages have been waived by some affirmative and unequivocal act, take steps of its own motion to ascertain their amount and secure their payment, and that mere passive acquiescence by an individual in the appropriation of property, unaccompanied by any conduct indicative of affirmative assent thereto, should not, unless continued for the statutory period of limitations, be regarded as a waiver of his rights. The second matter determined by the opinion, and about which the record leaves no room for doubt, is that the public have not occupied the lands in suit, continuously, for so long a time as is required by the statute to acquire, by that means, a prescriptive title to the alleged easement.

In view of these two findings, the conclusion at which the commission and the court arrived appears to us unavoidable, and we recommend that the former decision be adhered to.

LETTON and OLDHAM, CC., concur.

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Johnson County v. Carmen.

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By the Court: For the reasons stated in the foregoing opinion, it is ordered that the former decision be adhered to.

JUDGMENT OF REVERSAL ADHERED TO.

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JOHNSON COUNTY V. M. H. CARMEN, ADMINISTRATOR.

FILED APRIL 21, 1904. No. 13,488.

1. **Petition: MOTION.** In a suit against a county for damages on account of the death of a party caused by the giving way of a county bridge, the petition contained a general statement that the bridge was "out of repair and unsafe." *Held*, That a motion for a more specific statement should be sustained.
2. **Counties: DEATH: DAMAGES: INSTRUCTIONS.** In such action, the jury, in assessing damages, are limited to giving pecuniary compensation for injuries resulting to the next of kin on account of the death of the deceased. No damages can be given on account of the bereavement, mental suffering or as a solace on account of such death. An instruction relating to the measure of damages, which does not limit the assessment to the pecuniary injury sustained, is erroneous.
3. ———: **LIABILITY.** The county can not be held as an insurer of those who have occasion to use a county bridge. If the defect in a bridge, from which injury and damages occur to the person using it, is a latent defect, not discernible from the ordinary tests and examinations usually made to ascertain its condition, and if those charged with such examination have not been negligent in their duty in that regard, the county can not be held liable for damages caused by such latent and undiscovered defects.

ERROR to the district court for Pawnee county: JOHN S. STULL, JUDGE. *Reversed.*

*Jay C. Moore, Wilson & Brown and Hugh La Master, for plaintiff in error.*

*George A. Adams and S. P. Davidson, contra.*

DUFFIE, C.

July 25, 1901, Joseph B. Gooch was killed, while attempting to cross a bridge with his traction engine. The bridge gave way and, in the fall, the deceased was caught between the engine and the tender. M. H. Carmen, administrator of his estate, brought this action to recover for his death, alleging that the county authorities were negligent in allowing the bridge to become out of repair and unsafe. The answer denies negligence on the part of the county, and alleges that the condition of the bridge was unknown to the county officials although all due care and diligence had been exercised by them; that the defect was of such a nature that it could not be ascertained by the exercise of care and diligence; that deceased was negligent in going upon the bridge with such an extraordinary load, and in failing to take proper precautions by planking the bridge and detaching the tender, and by running the engine across the bridge by its own power instead of using horses to pull it across. The reply was a general denial. The petition does not point out any particular defect in the bridge, but alleges that it was "out of repair and unsafe." Error is alleged in the refusal of the court to require a more specific statement in the petition, pointing out wherein the county and its officers were negligent, and wherein the bridge was out of repair and unsafe. In so far as the motion required the plaintiff below to show in his petition in what particular the bridge was out of repair and unsafe, we think it should have been sustained. Under our system of pleading, the facts are to be stated, in order that the party proceeded against may know what facts his adversary relies on and against which he must defend. *Board of Commissioners v. Coffman*, 60 Ohio St. 527, 48 L. R. A. 455; *Tolles v. Meyers*, 65 Neb. 704. If the bridge was out of repair and unsafe, and the county commissioners had knowledge of this fact, or such condition of the bridge was discernible, or could have been ascertained, by reasonable care and inspection, and so continued for such

a length of time as to raise a presumption of knowledge, these facts show negligence upon their part in not repairing it, and the petition, so far as charging negligence, would be sufficient.

It is next urged that the court erred in not sustaining the objection to two of the jurors called in the case. We have read their examination with care, and we can not say that there was prejudicial error in retaining them upon the panel. They are apparently men of intelligence and candor, who stated that they would follow the direction of the court as to the law of the case, and, while they expressed some feeling and sympathy for the plaintiff, it is not unnatural, indeed it is human nature, that disinterested men should sympathize with the wife and children of a deceased husband and be inclined to lean to their support, rather than to that of a county by whose negligence it is charged the death of the husband and father was occasioned; at the same time, when an apparently candid juror states that he will observe the instructions of the court and be governed in his verdict by the law and the evidence, and that he has no preconceived opinion of the case which would prevent his doing so, no prejudicial error can be predicated upon the refusal of the court to sustain an objection to his serving as a juror in the case.

It is further urged that there could be no liability on the part of the county until notified of the defective condition of the bridge. This question has been settled by the former decisions of this court. *Hollingsworth v. Saunders County*, 36 Neb. 141; *Raasch v. Dodge County*, 43 Neb. 508.

The eighth instruction given is the only one in which the measure of damages was referred to by the court. In that instruction the jury were told that, if they found for the plaintiff, "then and in that case you will assess the amount of the recovery herein at such sum as you think from the evidence would be right and just." It will be noticed that this instruction does not confine the jury to any particular element of damage. The statute under

which the action was brought restricts the damages to the pecuniary injury resulting from the death, not to exceed the sum of \$5,000. In this class of actions the jury, in assessing the damages, are limited to giving pecuniary compensation resulting to the next of kin on account of the death of the deceased. No damages can be given on account of the bereavement, mental suffering, or as a solace on account of such death. *Steele v. Kurtz*, 28 Ohio St. 191; *Anderson v. Chicago, B. & Q. R. Co.*, 35 Neb. 95. We think that a serious error was made in not confining the jury to the one element of damage allowed by the statute. As is well said in plaintiff's brief: "To the average layman the greatest loss to the widow and orphan would be the deprivation of the society and companionship of the husband and father. No element of damage would in the mind of the average jurymen be at all comparable to this in such a case. \* \* \* Another element of injury that would appeal strongly to the average jury is the grief and mental anguish caused to the widow and orphan by the untimely death of the husband and father." Yet under the instructions of the court all of these matters could be, and probably were, considered by the jury in arriving at their verdict.

Instructions 8 and 9 are objected to by plaintiff in error for the reason that the jury are told that, if the defect in the bridge had remained for a long time prior to the accident, then the county would be liable. If the defect was an open one, which could be observed on reasonable inspection and examination, no fault could be found with this charge; but it was the contention of the county, and there was evidence in support of the theory, that the defect was latent and not observable by any ordinary inspection, or test, or examination that might be made. While the statute makes the county liable for damages resulting from the defective condition of the bridge, the same rules of law applicable in other cases must be applied. Latent defects in the timbers of a bridge, which can not be discovered by the ordinary means usually adopted for testing the sound-

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ness of timber and the safety of the structure, would relieve the county from the charge of negligence, and be a defense to a claim for damages arising from the latent defect. These instructions were improper in not recognizing this rule. Other errors complained of need not be discussed as they will not probably occur upon another trial.

For the errors above pointed out, we recommend a reversal of the judgment and that the cause be remanded for another trial.

LETTON and KIRKPATRICK, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is reversed and the cause remanded for another trial.

REVERSED.

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WESTERN WHEELED SCRAPER COMPANY V. J. M. McMILLEN  
ET AL.

FILED APRIL 21, 1904. No. 13,497.

1. **Promissory Note: EXECUTION BY AGENT.** The court is fully committed to the doctrine that, in order to exempt an agent from liability upon a negotiable note executed by him within the scope of his agency, he must not only name his principal, but he must express by some form of words that the writing is the act of the principal though done by the hand of the agent.
2. ———: **REFORMATION: PAROL EVIDENCE.** Though the language of a note executed by directors of a corporation imports a personal obligation, it may be shown by parol evidence, on an issue of reformation, that the intention of both the makers and the payee was to execute an instrument binding the corporation only, and that, though the language was that which they intended, it did not express their true purpose.

ERROR to the district court for Thomas county: JAMES N. PAUL, JUDGE. *Reversed with directions.*

*C. H. Holcomb*, for plaintiff in error.

*H. M. Sullivan*, *contra*.

DUFFIE, C.

Plaintiff in error brought suit against the defendants in error upon three promissory notes, all in the following form:

"\$84.            THEDFORD, NEBRASKA, NOVEMBER 20, 1893.

"One year after date we promise to pay to the Western Wheeled Scraper Company, or order, at Thedford Bank of Thedford, Nebraska, eighty-four and no-100 dollars, with interest at seven per cent. per annum, payable annually, for value received, and if action is commenced hereon, attorney's fees for collection. (Sign officially.)

"J. M. McMILLEN,

"G. W. MILLER,

"G. L. MATTHEWS,

"*Directors of Thedford Irrigation & Power Co.*

"*(limited).*"

McMillen and Matthews alone answered. Their answer consists, first, of a general denial. Second, they allege that the notes sued on were executed and delivered to the plaintiff by, for and on behalf of the Thedford Irrigation & Power Company (limited), a corporation organized under the laws of Nebraska, by their then duly qualified and acting board of directors, of whom the defendants were at that time members, and were signed by them in their official capacity, and for the purchase of a grading machine bought of the plaintiff for the use and benefit of the Thedford Irrigation & Power Company (limited); that the defendants never had or claimed any interest in said machine except as members and stockholders of said irrigation company, and that the consideration for said notes moved from said Western Wheeled Scraper Company to the said Thedford Irrigation & Power Company (limited), and that the plaintiff had always so considered and treated said notes; that defendants never received any value for said notes except as members of said corporation, and have

never assumed or agreed to assume any personal liability on said notes. To this answer there was a reply which is, in effect, a general denial of the allegations of the answer. The evidence tended to show that the defendants were members of the board of directors of the Thedford Irrigation & Power Company (limited) at the time of the execution of said notes; that, prior to the making of the notes, defendants negotiated with an agent of the plaintiff for the purchase, for the use of the irrigation company, of a wheeled scraper to be used in the construction of its ditch; that it was finally agreed a scraper should be sent for and tested, and, if it worked as represented by the agent, the irrigation company would purchase the same, giving notes of the company therefor; that the test proved satisfactory to the directors, who purchased the machine for the company, and executed the notes in suit in the form above set out, supposing that they were binding the company and with no intent to make themselves individually responsible for their payment, and that the agent of the plaintiff taking said notes so understood.

The court, in its seventh instruction, told the jury:

"You are further instructed that if you should believe from a preponderance of all the evidence in this case that the three notes set out in plaintiff's petition were made and executed by the Thedford Irrigation & Power Company (limited), and if said notes were signed by said defendants with the intention and understanding to bind the Thedford Irrigation & Power Company (limited), and not the signers of said notes as individuals, and if you should find from a preponderance of all the evidence that it was so understood by and between the agent of plaintiff and these defendants, at the time said notes were executed and delivered, then your verdict should be for the defendants, 'No cause of action.'"

The jury returned a verdict for the defendants, and the plaintiff has brought the record to this court for review.

The petition in error, among other matters, alleges "that the court erred in permitting the defendants to in-



roduce oral testimony tending to prove a different contract than that set out in the written contract, namely, the notes sued upon," and in giving the instruction above quoted and other instructions which it is unnecessary to discuss. The general rule undoubtedly is that, on account of the qualities which the law annexes to negotiable instruments, none are bound except those who appear on the face of the instrument as bound, and, accordingly, extrinsic evidence can not be admitted to charge parties whose names do not appear on the face of the instrument. In 4 Thompson, Corporations, sec. 5141, it is said:

"The modern doctrine seems to be that, where individuals subscribe their proper names to a promissory note, they become *prima facie* liable personally upon the same, although they add a description of the character in which the note is given; but such presumption of liability may be rebutted by proof that the note was in fact given by the makers as agents of a corporation, for a debt of the corporation, due to the payee, and that they were lawfully authorized to make such note as agents of the corporation; and such facts may be pleaded in bar of the action against the makers personally, averring knowledge on the part of the payee." He states further: "It is no objection to such a defense that the name of the corporation is not correctly stated in the description attached to the signature; it is enough if it appear that the makers did not intend to be personally bound. But it should be shown that the payee of the note had knowledge, or at least the full means of knowledge, that the makers of the note were promising as agents, duly authorized, of the corporation; for 'it is well settled that a man, contracting with another, can not shield himself as agent, unless he give notice at the time that he is so, or it be known in some other way to the person with whom he deals.'"

It is undoubtedly true that the modern cases are more liberal than was formerly the case in allowing one who signs a negotiable instrument, designating himself as agent or trustee, to show by parol evidence that he was acting

for another, who received all the benefits of the consideration for which the note was given. *Keidan v. Winegar*, 95 Mich. 430, 20 L. R. A. 705, is a case in point; and other cases referred to in the notes of the editor will furnish examples of the relaxation of the rule adopted by the courts at an earlier date upon this question. If this court had not put itself on record, we should be disposed to follow the modern decisions, but as early as 1886, in *Webster v. Wray*, 19 Neb. 558, the court, after a full review of the authorities, held that "no party can be charged as principal upon a negotiable note or bill of exchange unless his name is thereon disclosed," and it was further held in that case that parol evidence was not admissible to show that one who appeared upon the face of the notes to be the maker was in fact acting as agent for another, or as the officer of some corporation which had received the benefit of the consideration. This case was followed by *Andres v. Kridler*, 47 Neb. 585, where suit was brought upon a note made and signed substantially in the manner of those in suit, and it was held that, "where the pleadings disclose a cause of action against a defendant personally, superadded words, such as 'agent,' 'executor,' or 'director' should be rejected as *descriptio personarum*."

We think this court is now fully committed to the doctrine that in order to exempt an agent from liability upon an instrument executed by him within the scope of his agency, he must not only name his principal, but he must express by some form of words that the writing is the act of the principal, though done by the hand of the agent. If he expresses this, the principal is bound and the agent is not; but a mere description of the general relation or office which the person signing the paper holds to another person or to a corporation, without indicating that the particular signature is made in the execution of the office and agency, is not sufficient to charge the principal, or to exempt the agent from personal liability. There was evidence which would fully support a finding that, in executing these notes, the defendants did not intend to bind themselves

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personally, and that the plaintiff's agent was not only fully aware of that fact and understood that he was taking the notes of the corporation, but assisted and advised as to the form in which the notes should be drawn in order to make them the obligation of the corporation. This being the case, the defendants, upon a proper plea, would be entitled to have the notes reformed to express the real intention of the parties. *Western Wheeled Scraper Company v. Stickleman*, 122 Ia. 396, and authorities there cited.

We recommend, therefore, that the case be reversed and remanded to the district court, with directions to allow the defendants to amend their answer if they so elect, otherwise to enter judgment for the plaintiff for the amount due upon the notes.

LETTON and KIRKPATRICK, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment is reversed and the cause remanded to the district court, with directions to allow the defendants to amend their answer if they so elect, otherwise to enter judgment for the plaintiff for the amount due upon the notes.

REVERSED.

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MARY L. HENRY V. ANDREW DUSSELL

FILED APRIL 21, 1904. No. 13,301.

1. **Contract: CONSIDERATION.** The consideration sufficient to support a promise may be a detriment suffered by the promisee in reliance upon the promise, as well as a benefit accruing to the promisor.
2. **Directing Verdict.** Where, in an action on a contract, the defendant pleads illegality of consideration and duress, upon a return of a finding as to the two defenses pleaded adverse to the defendant, it is proper for the court to instruct the jury to find for the plaintiff, if, under the pleadings and the evidence, facts sufficient to show that the contract is upon a valid consideration appear uncontradicted.

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3. **Instructions: ERROR WITHOUT PREJUDICE.** In such case, if the issue of illegality of consideration and that of duress are properly submitted to the jury, upon which their verdict is adverse to defendant, it is not error prejudicial to defendant that the court, instead of directing the jury to find for the plaintiff upon the issue of consideration, instructs the jury incorrectly as to what constitutes a valid consideration for the contract.
4. ———: ———. An instruction which contains an inaccurate statement of the law will not work a reversal of the judgment, if it is manifest that the instruction could not have confused or misled the jury, and where it appears that the verdict must have been the same, if the instruction had been technically correct.
5. **Trial: ARGUMENTS.** Whether or not, after argument by counsel for plaintiff to the jury, the defense can cut off further argument by waiving argument on his own behalf is a matter within the sound discretion of the trial court regulating the procedure of the trial.
6. **Rulings: DISCRETION OF COURT.** Under the facts stated in the opinion, *held*, that the ruling of the trial court was not an abuse of discretion.
7. **Instructions.** Instructions requested, given and refused, examined, and *held*, that the rulings of the court thereon were not prejudicially erroneous.
8. **Rulings.** Rulings of the trial court on the admission and exclusion of testimony, examined, and *held* not erroneous.
9. **Evidence.** Evidence examined, and *held* that the verdict and judgment are sustained by the evidence.

ERROR to the district court for Platte county: JAMES A. GRIMISON, JUDGE. *Affirmed.*

*Allen & Reed and W. N. Hensley, for plaintiff in error.*

*Reeder & Hobart and McAllister & Cornelius, contra.*

KIRKPATRICK, C.

Mary L. Henry prosecutes this proceeding from a judgment of the district court for Platte county rendered in an action brought by Andrew Dussell against Mary L. Henry to recover upon a contract for the payment of money. This contract is in the following language:

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"This agreement, made and entered into this 24th day of March, 1902, by and between Mary L. Henry of Columbus, Nebraska, and Andrew Dussell of the same place, witnesseth as follows: Whereas the said Mary L. Henry is the mother of Robert H. Henry, an infant between 18 and 19 years of age, and the said Andrew Dussell is the father of one Jessie G. Dussell, of the age of 17 years, and, whereas the said Robert H. Henry and the said Jessie G. Dussell, with the consent of their parents, the parties to this contract, are about to be married, which said marriage is believed by all parties to be for the best interests of all persons concerned, and, whereas the said Robert H. Henry has not possession or control of any means or property wherewith to support the said Jessie G. Dussell, and defray the expenses of her expected sickness, and, whereas the said Mary L. Henry has possession and control of property and means to which the said Robert H. Henry will be entitled on reaching his majority: It is therefore agreed by the said Mary L. Henry that she will pay to the said Andrew Dussell, the first party hereto, within 10 days, the sum of five hundred dollars (\$500), of which sum three hundred dollars (\$300) shall be applied to defray the expenses of the said Andrew and the said Jessie G. up to the present time, the remaining two hundred dollars (\$200) shall be applied to the future maintenance and support of the said Jessie G.; and the first party further agrees, at such time and times as may be necessary, to pay such other and further sums to the said Andrew Dussell for the support and maintenance of the said Jessie G. as may be necessary, so long as she remains the wife of the said Robert H. Henry; and the said Andrew Dussell agrees, on his part, to see that the said Jessie G. is provided with a suitable room, shelter, clothing and medical attendance from the proceeds of said money, and to apply the said money, and also such other sums as may be paid to him, to the support of the said Jessie G. as may in his judgment seem meet and proper, rendering an account thereof to the said first party. Wit-

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ness our hands this 24th day of March, 1902, in duplicate.

"In presence of

"J. G. REEDER.

"MARY L. HENRY,

"ANDREW DUSSELL,

"By ERNEST P. DUSSELL."

In the petition this contract is set out *in hæc verba*, and it is alleged that Robery H. Henry and Jessie G. Dussell were united in marriage in Denver, Colorado, March 24, 1902; that the plaintiff, pursuant to said contract, provided the said Jessie G. Dussell with suitable room, shelter, clothing, nursing and medical attendance, and that a child has been born to Jessie; that the plaintiff has kept and performed all the conditions of the contract on his part to be performed, and that the defendant, Mary L. Henry, has failed and refused to pay the sums of money provided by the contract by her to be paid, and judgment in the sum of \$500 is prayed. The answer pleaded that the contract declared upon was without any consideration, that the real consideration was an unlawful one, namely, the abandonment of a prosecution against Robert H. Henry for rape pending before a justice in Platte county, and that the signing of the contract on the part of the defendant was brought about by duress consisting of threats that, unless it was signed, Robert H. Henry would be incarcerated in the Nebraska penitentiary, which threats deprived defendant of her free volition. Plaintiff's reply was a general denial. A trial to a jury resulted in a verdict and judgment for plaintiff for the full sum prayed for.

There are many assignments of error, and we will consider and pass upon those which are deemed of importance in a correct disposition of the controversy. Preliminary to a discussion of the legal questions involved, a statement of the principal facts will be given. The parties to this suit, as well as the daughter of the plaintiff and the son of the defendant, lived in the city of Columbus, this state. Defendant is a widow, and some time prior to the execu-

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tion of the contract in suit had gone with her son to the state of Colorado, apparently upon medical counsel that a change of climate was necessary on account of the health of her son. It appears, however, that, prior to the departure of defendant and her son for Colorado, Robert H. Henry and Jessie G. Dussell had sustained relations resulting in the pregnancy of Jessie. This fact coming to the knowledge of plaintiff, proceedings were commenced for the arrest and extradition of Robert, that he might be made to answer to the charge of rape upon the person of Jessie. Requisition papers were issued by the governor of the state of Nebraska, which were taken by one Byrnes, sheriff of Platte county, together with one Reeder who accompanied him, to Colorado, and there presented to the governor of that state, who, upon the showing made, issued a governor's warrant for the arrest of Robert. Defendant contended at the trial that she knew nothing of the relations sustained by her son toward Jessie Dussell until waited upon and informed of the charge pending against him by Byrnes and Reeder. Be that as it may, it appears that defendant, when apprised of the situation, asked if anything could be done to settle the matter, and was told that the marriage of her son with Jessie would be satisfactory, and would be regarded as a reparation. The contract in suit was thereupon drawn up, signed and delivered.

It appears from the evidence that the father of Jessie, plaintiff, was a man of ordinary means, and that Jessie, his minor daughter, was his housekeeper, her mother being dead. It is also made apparent that the Henrys were in more than comfortable circumstances. We mention these two facts at this time because they, in a measure, throw light upon the situation which resulted in the execution of the writing which forms the basis of this action. It is also convenient at this time to advert to the defense of duress, hereinafter more particularly considered. It was contended by defendant that the contract was obtained by intimidation and threats. This contention may

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be regarded as eliminated from the case by the verdict of the jury. We believe that their special finding in regard thereto is amply supported.

Robert and Jessie were married, as alleged in the petition, and, subsequently, Jessie gave birth to a child. Medical attendance and nursing were provided by plaintiff. There is no question to be made, under this record, as to the paternity of the child; it is that of Robert H. Henry. He appears from the evidence to have been quite willing to marry Jessie.

The first question for determination is, whether the petition states a good cause of action. It was not attacked by demurrer at the trial, but objection was raised for the first time after issues were joined and the trial commenced. It is therefore entitled to a more liberal construction than it would otherwise be. Defendant invokes the familiar rule that, where the declaration is upon a simple contract, the petition must plead the consideration, unless the consideration is recited in the contract and that is set out *in hæc verba*. As no particular allegation in the petition purports to set forth the consideration, our inquiry will be confined to the contract, which appears in the petition in its entirety. The question is, whether it shows a consideration sufficient to bind defendant to her promise. It is not material that it recites facts which, standing alone, would not constitute a legal consideration. It appears that one of the parties to the contract was the father of a minor daughter; the other the mother of a minor son; also, that the intercourse of the minors had resulted in the pregnancy of the daughter. The minority of these children, and the pregnancy of Jessie by Robert, constituted the conditions confronting the parties to this contract and with which they sought to deal. Much of the argument of counsel for defendant is directed to the inquiry, whether this contract shows that anything of value, a benefit of any kind sufficient to constitute a consideration, passed to Mary L. Henry; or whether, by making the promise, she escaped any burden for which otherwise she would be



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legally liable. It is asked, whether the immoral relations of Robert and Jessie imposed on defendant an obligation to pay either to Jessie or her father a sum of money. We think it may be answered that the relations of Robert and Jessie, resulting in the latter's pregnancy, did not impose any legal obligation on defendant. But it is not necessary, in our view, to point out any specific benefit that accrued to Mary L. Henry by reason of her promise. The agreement is not a *nude pact*, even though it is manifest that defendant received no benefit at all. *Shaffer v. Ryan*, 84 Ind. 140; *Rucker v. Bolles*, 80 Fed. 504; *Dorwin v. Smith*, 35 Vt. 69; *Dyer v. McPhee*, 6 Colo. 174. It seems that a benefit to the promisor is not an essential to consideration, but that consideration may be a detriment to the promisee or a benefit to a third person. It is the view of some of the courts that this is the only true and invariable test of consideration. Does it appear from this contract that plaintiff in reliance upon the promise of defendant suffered a detriment? Not as a result of a breach of the agreement, but as a result of entering into it and acting in reliance on it? If this question can be answered in the affirmative, the contract is not unsupported by a valid consideration.

Now, to us it appears perfectly plain that the making of this contract depended upon the consent of the plaintiff to the marriage of his daughter to the son of defendant. He was not under any obligation to consent to this marriage. She was a minor at the time of the making of this contract. It is not necessary to decide whether he had a right of action against the seducer of his daughter, and whether by this contract and his consent to her marriage he waived such right of action. It is clear that he was entitled to her services until her majority, which, except for this marriage, would not have occurred for some time thereafter. Under the facts shown in evidence, those services were more than ordinarily valuable to him, but the mere quantum of their value is not material. To our mind, the contract may be read as if thereby the defendant said,

"If you will consent to your daughter's marriage to my son, thereby surrendering your claim upon her services during her minority, I will," etc. The legal effect of plaintiff's consent to his daughter's marriage was a surrender of his right to her services during minority, and it is equally clear that there could have been no contract without this consent. If, therefore, plaintiff's reliance on defendant's promise resulted in a detriment to him, it is immaterial whether the making of that promise secured a benefit to defendant. Under this state of facts, we would certainly hesitate to declare this contract wholly void, and conclude that, as declared upon in the petition, it sufficiently shows a valid consideration.

Among the remaining contentions of defendant, several require but little consideration, inasmuch as they are dependent upon questions of fact, which were resolved by the verdict of the jury adversely to defendant. The first of these was the defense that the real consideration was the abandonment of the proceedings pending against Robert in Platte county. This question was submitted to the jury for a special finding, and they say this was not the real consideration. We believe, after an examination of the evidence, that this verdict is right.

We have already adverted to the defense of duress. Under this plea it was sought to be shown that defendant signed the contract because of the threat that, if she did not, her son would be prosecuted and imprisoned, and the promise that, if she did, he would be permitted to go free; and that, confronted with this alternative, she was deprived of her free volition. Our examination of the testimony, and particularly of that of defendant, upon this question has convinced us that the jury were amply justified in finding against defendant upon this contention. It is true, she says she signed the contract to save her boy from prison, but her own narrative of the events immediately preceding the execution of the contract is not calculated to corroborate this statement. This interview, looked at even through the medium of this narrative, seems

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to have been one especially free from conduct and influences calculated to deprive defendant of her free will. It was characterized by an evident desire, not only on the part of those representing plaintiff, but defendant also, to do the thing that would be right and proper. Defendant was no doubt disappointed upon learning of her son's intimacy with a young woman, who, perhaps, would not have been selected by Robert's mother to be Robert's wife, but we believe the record shows that she took a philosophic view of a bad situation. It is to be remarked that the son was not averse to the union, and this woman appears to have entered into this contract freely and voluntarily.

The court upon its own motion gave the two following instructions to the jury:

"5. You are instructed that if you believe from the evidence that the defendant Mary L. Henry voluntarily entered into said contract, that said contract was founded upon consideration of the marriage of Jessie G. Dussell, daughter of plaintiff, to Robert H. Henry, son of defendant, and that said marriage was the cause actuating defendant in executing and delivering said contract to said plaintiff, then said contract is a valid and binding contract.

"6. If you find from the evidence that the consideration of the contract sued upon was the abandoning or agreement to abandon the criminal proceeding against Robert H. Henry, son of defendant, then such consideration is not a legal consideration, and your verdict should be for the defendant."

This instruction is not a correct statement of the law. If the plaintiff in the making of this contract had acted as the agent of his daughter, making the contract for her and on her behalf, she would doubtless be in a position to enforce it. In such event her marriage would have been a consideration. But this contract is a sole and independent one between the parties to this suit. The consideration of the promise must move from the plaintiff.

But while this instruction is not correct, we are of opin-

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ion that the giving of it was not such error as requires the reversal of the judgment. In our consideration of the sufficiency of the petition, we concluded that a consideration sufficient to support the contract was therein shown, namely, the surrender by the plaintiff, in reliance upon the promise, of his right to the services of his daughter. This was a detriment suffered by him, and followed as a legal consequence upon his consent to the marriage. The answer pleaded illegality of consideration and duress. Upon these two issues defendant was entitled to have the jury properly instructed. The execution of the contract being admitted, it followed from an adverse verdict upon the two defenses pleaded that the contract was valid and binding, and plaintiff, as a matter of law, was entitled to recover. It is apparent, then, that the giving of instruction numbered 5 was not prejudicial to defendant. It had no tendency to confuse or mislead the jury in the consideration of the two issues properly submitted to them. The trial court might well have instructed the jury that, if they found against defendant on both the defenses pleaded, their verdict should be for plaintiff. The giving of a wrong instruction, which could not possibly have prejudiced the defendant, will not justify the reversal of the judgment.

The complaint directed against instruction numbered 6 is that it is confined to the defense of illegal consideration, and makes no mention of the defense of duress. But the latter defense was properly treated in subsequent instructions.

The defendant asked the court to instruct the jury that the doctrine of marriage settlement had no application to this case, and in this instruction matters in explanation of what constituted a marriage settlement were incorporated. There was nothing in the evidence or in the issues joined by the pleadings suggestive of a marriage settlement, and we fail to understand upon what principle a negation of this kind was necessary to go to the jury.

The defendant asked the court to instruct the jury that the marriage of the minor children of plaintiff and defend-

ant was not a consideration for the contract in suit, and that, unless they found that there was another and different consideration, they must find for defendant. In view of what has just been said with reference to instruction numbered 5 given by the court, the refusal of this request was not error prejudicial to the rights of defendant.

The defendant requested an instruction to the effect that, under the law of this state, plaintiff had no right of action against the seducer of his minor daughter, which was refused. This request was based upon evidence to the effect that those representing plaintiff at the interview, which resulted in the execution of the contract in suit, stated to defendant that plaintiff had such right of action. Defendant asked to have the jury instructed as indicated, and that, if defendant's belief in this representation was an inducing cause to the execution of the contract, that fact, together with other facts, might be considered in connection with the defense of duress. The court instructed the jury, and we think properly, that if they found that defendant entered into the contract freely and voluntarily, and not because of fear or duress, the statements made by Reeder and Byrnes were immaterial. The issue of duress having been submitted to the jury, the refusal of the requested instruction just referred to was not error.

The court instructed the jury at the request of plaintiff that, if they found that at the time of the execution of the contract there was no agreement or promise on the part of plaintiff to abandon the prosecution of Robert, then the defense of compounding a felony was not sustained, and upon that issue they should find for the plaintiff. It is said that this instruction states but half the truth. If we do not misapprehend counsel, it is sufficient to say that the other half is embraced in instruction numbered 6, heretofore quoted.

The criticism directed toward other instructions which were given are with reference to the court's statements as to what did constitute a sufficient consideration. We do

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not believe, in view of views already expressed, that the jury were misled as to the issues properly before them, and defendant suffered no prejudice by reason of the instructions complained of. The same may be said with reference to the instruction that, under the law, if a female between the ages of 16 and 18 marries, her minority ends. This instruction was unnecessary but can not have been prejudicial.

There is an extended discussion in brief of counsel for defendant with reference to the alleged errors of the trial court in the admission and exclusion of testimony. The errors assigned are several hundred in number, and of necessity the space devoted by counsel in the discussion of each error is limited. Some of the rulings complained of excluded testimony of defendant, or struck out answers as not responsive. Some of the evidence excluded was afterwards admitted. In other cases the rulings do not seem to have been erroneous in view of the issues being tried. We have carefully read the evidence, together with the rulings made by the court, bringing to bear on our inquiry all the light which counsel have shed by means of brief and oral argument, and we are satisfied that there was no prejudicial error committed by the court. It would make this opinion unwarrantably long to discuss each assignment in detail. The record is voluminous, but our examination has convinced us that the trial was had with circumspection and care, and the rulings of the court were fair and reasonable.

It is contended that there was error in denying to counsel for defendant the right to argue the case before the jury. It appears that by agreement each side was to have two hours for argument, the defendant to open and close, and not to use more than half the time allotted in the closing argument. Pursuant to this agreement counsel for defendant occupied a little over an hour in the opening argument, whereupon counsel for plaintiff announced that the plaintiff waived argument. Further argument on behalf of defendant was not permitted by the court, the argument

being held to be at an end. It is quite possible that, under some circumstances, to put it in the power of the defense to close the argument in this manner would result in a hardship, but we are inclined to adopt the views expressed by the supreme court of Michigan in *Barden v. Briscoe*, 36 Mich. 254, that matters of this kind rest in that large discretion of the trial court by which the general course of procedure is regulated, and that an appellate court would not be justified in making the ruling a ground for reversal unless it was manifest that the discretion was abused. That there was an abuse in this case, we are certainly not prepared to say, and this ruling will not be held to be erroneous.

Complaint is lodged against the order of the trial court in taxing costs against the defendant, the contention being that the amount involved in the case brought it within the jurisdiction of the county court, and the case not having been brought there, costs were not under the ruling of this court recoverable in the district court. Several cases from this court are cited which, however, do not sustain the point. We do not know of any rule which prevents a plaintiff from recovering his costs in a case brought in the district court in the first instance, unless it be in the case of an action whereof it appears a justice of the peace had jurisdiction. Section 621 of the code. Such is certainly not this case.

We have gone over this record, and the extended and exhaustive argument in support of the errors assigned, and have failed to see wherein it appears that the trial court erred to the prejudice of defendant. It is therefore recommended that the judgment of the district court be affirmed.

DUFFIE and LETTON, CC. concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is

**AFFIRMED.**

IN THE MATTER OF THE APPLICATION OF GEORGE W. TIERNEY FOR A LICENSE TO SELL MALT, SPIRITUOUS AND VINOUS LIQUORS.

FILED APRIL 21, 1904. No. 13,432.

**Liquor License.** Under the provisions of section 1, chapter 50, Compiled Statutes, the licensing board, upon the hearing of an application to grant a liquor license, must pass upon the character and standing of the applicant and his citizenship, and the board is without authority to delegate these functions to another person or corporation by issuing the license in the name of one shown to be not the real party in interest, upon the understanding that such person or corporation will select a person to conduct the business under the license.

ERROR to the district court for Douglas county: LEE S. ESTELLE, JUDGE. *Reversed.*

*Cooper & Dunn*, for plaintiff in error.

*Charles Ogden and Hamilton & Maxwell*, contra.

KIRKPATRICK, C.

This case is an application for a liquor license presented by George W. Tierney to the board of fire and police commissioners of the city of Omaha. A remonstrance to the granting of the license was filed by I. J. Dunn, a resident taxpayer. The remonstrance was overruled by the board, and the license granted. An appeal from the action of the board was taken by Dunn to the district court, where trial resulted in a judgment sustaining the action of the board. From the judgment so entered the cause is brought to this court on error.

The remonstrance filed by Dunn with the board, omitting formal and certain immaterial portions, is in the language following:

"3d. That said party is not entitled to a license for the reason that he is not the real party in interest, but is securing said license to be used and controlled, not for himself,



but by the real party in interest, who is in fact securing, and who will control the said license if granted, to wit, the Storz Brewing Association."

At the hearing before the board, in lieu of all other evidence, an agreed statement of facts was presented, upon which the cause was submitted. This agreed statement of facts is in the language following:

"It is hereby stipulated by the said applicant and remonstrator that this application is made in the interest of and for the Storz Brewing Company, a corporation, of which said applicant is collector, said corporation being engaged in the brewing business; that the Storz Brewing Company has paid the license fee of \$1,000 herein, and asks that the license be granted in the name of George W. Tierney, as a matter of convenience; that after the license is granted on this application, the Storz Brewing Company intends to place some proper person in charge of said saloon to operate the same under a business arrangement with the Storz Brewing Company, and who will run said saloon as his own business venture so far as the profits and losses of said business are concerned; that the Storz Brewing Company will not be interested in the profits, nor responsible for the losses of said business; said party will be placed in charge of said saloon to run it under the license of said applicant, and will be required to pay the Storz Brewing Company the license money by said Storz Brewing Company paid, and will be required to sell the beer of the said Storz Brewing Company, and to pay the rent of the building on such terms as may be agreed upon between said parties. It is understood that the party placed in charge of said saloon under the arrangement referred to will take out a government license in his own name to sell liquor at said place."

But a slight examination of the agreed statement of facts quoted is sufficient to show that the license in question ought not to have been granted. Section 1, chapter 50, Compiled Statutes (Annotated Statutes, 7150), being a part of the statute governing the granting of liquor

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licenses, provides that, before a license shall be granted to any person to sell liquor, a petition shall be presented to the licensing board, setting forth that the applicant is a man of respectable character and standing, and a resident of the state. The licensing board has no right to grant a license until it is made satisfactorily to appear that the person to whom the license is to be granted, and who is to run the saloon, is a man of respectable character and standing, and that he is a resident of the state. It is disclosed by the agreed statement of facts that the man Tierney, in whose name the license is to be issued as a matter of convenience, has no interest in the matter, but "that, if the license is granted on this application, the Storz Brewing Company intends to place some proper person in charge of said saloon to operate the same under a business arrangement with the Storz Brewing Company." It is proposed to permit the brewing company to select the man who is to conduct the saloon. The arrangement contemplates investing the brewing company with the function and responsibility of passing judgment upon the character and standing of the man who is to conduct the business. The selection is to be made entirely by the brewing company. It is not only to determine his standing in the neighborhood wherein he resides, but is also to pass upon the question of his citizenship. We have experienced no difficulty in coming to the conclusion that such an arrangement would be an apparent evasion of the statute. It amounts to an abdication by the board of its functions and legal powers, which are to become the regal garments of another institution not recognized in the statute. It is not for us to deny that the brewing company is better qualified to decide whether an applicant has the character and standing contemplated by the law, as well as decide the question of his citizenship. But to us it seems quite plain that the legislature deemed it wiser to vest this power in a duly constituted and legal board, whose identity and personnel would be matters of public knowledge, whose duties would be to receive applications, hear and entertain remon-

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stances, and bring to bear their own judgment and personal and official responsibility in deciding whether the applicant is shown to be qualified under the statute to be a licensee. A liquor license is in the nature of a personal privilege, and the petitioners must represent the applicant to be such a person as the law permits to receive a license. The effect of the scheme disclosed by the agreed facts is to issue a license in blank, to be hawked and sold by the brewing company, and to take from the board its power to determine the character and fitness of the applicant. This the law does not permit.

It is contended on behalf of the applicant that, inasmuch as Tierney is a man of respectable character, the presumption must obtain that the brewing company will consult with him in the selection of the man to run the saloon who will have a respectable character. It is suggested that this court has said that the saloon may be run by an agent of the licensee, and that the scheme disclosed by the record amounts simply to this. We do not see anything of merit in this suggestion. The parties have, as we have already seen, attempted to do something neither allowed nor contemplated by the statute. The action taken by the licensing board in overruling the remonstrance and granting the license, and the judgment of the district court upon the appeal are wrong and should be set aside. It is therefore recommended that the judgment of the district court and the board of fire and police commissioners be reversed and set aside, and the license canceled.

LETRON, C., concurs.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court and the fire and police commissioners is reversed, and the license canceled.

REVERSED.

**ZEBULINE H. SCHAFER, APPELLEE, v. PAUL J. SCHAFER,  
APPELLANT.**

**FILED APRIL 21, 1904. No. 13,526.**

1. **Divorce: VACATING DECREE.** The provisions of sections 602 of the code apply to divorce proceedings as well as to other proceedings in which it is sought, upon the grounds therein mentioned, to vacate or modify a decree or judgment after the term.
2. **Statute: CONSTRUCTION: REPEAL BY IMPLICATION.** Repeals by implication are not favored, and a construction of a statute which, in effect, repeals another statute will not be adopted, unless such construction is made necessary by the evident intent of the legislature.
3. ———: ———. Sections 1 and 2, chapter 49, laws of 1885, *held* to apply to the commencement of proceedings in the supreme court, and not to repeal section 602 of the code in its application to proceedings commenced in the district court to vacate a decree of divorce.
4. **Petition: SUFFICIENCY.** Petition for new trial under the provisions of section 602 examined, and *held* to state a cause of action.

**APPEAL from the district court for Douglas county: GUY  
R. C. READ, JUDGE. *Reversed.***

*Burkett & Greenlee, for appellant.*

*Geo. A. Magney, contra.*

**KIRKPATRICK, C.**

On October 22, 1902, appellee procured to be entered by the district court for Douglas county a decree of divorce in her favor, and against the appellant, awarding to her the custody of their three minor children, and enjoining appellant from in any way interfering with their custody and control. Appellant was a resident of the state of California, and made no appearance in the case until after the decree, service having been made upon him by publication. On the 18th day of August, 1903, appellant filed in the district court a petition asking a new trial under the provisions of section 602 of the code, and that he be allowed to

defend. The petition is of too great length to be copied herein, but it sets out facts which, if true, show that appellee was a nonresident of the state at the time she procured her divorce; that her allegation of residence was a fraud upon the court; and that the divorce was obtained upon unlawful, corrupt and perjured testimony of the extreme character, and that appellant had an absolute defense to the cause of action set out in her petition; that appellant had no knowledge of the pendency of the proceedings for nearly a year, and until after the adjournment of the term; that the notice was fraudulently published in an obscure weekly paper in Douglas county, for the purpose of preventing appellant from acquiring knowledge of its pendency; that the next day after the decree was entered, appellee crossed the river into Council Bluffs, Iowa, and there intermarried with one Beck, whose intimacy with appellee, it is alleged, was the cause of the separation of the parties, which occurred in California. Appellant, in his petition, brought himself fully and clearly within the provisions of section 602 of the code, authorizing the granting of new trials after the term at which the decree was rendered.

Appellee contends that, by the provisions of section 45 and 46, chapter 25, Compiled Statutes (Annotated Statutes, 5369, 5370), all divorce proceedings are taken out of the provisions of section 602, and that, in proceedings to vacate or modify a decree of divorce, or to obtain a new trial in a divorce case, except in so far as it affects alimony or the custody of children, they must be brought within 6 months; and that, conceding all that appellant alleges in his petition to be true, and that the divorce was obtained by perjury, and that the court had no jurisdiction, yet, the court is powerless to grant appellant any relief. The doctrine contended for strikes us as monstrous, and we are not inclined to accede to its correctness, unless the language of the statute is such as to make that construction imperative. The act relied upon by appellee in support of her contention was passed in

1885. (Laws, ch. 49.) It is composed of two sections, in the language following:

"Section 1. It shall be unlawful for any person who shall obtain a decree of divorce to marry again during the time allowed by law for commencing proceedings in error or by appeal for the reversal of such decree, and in case such proceedings shall be instituted it shall be unlawful for the defendant in error or appellee to marry again during the pendency of such proceedings, and a violation of this act shall subject the party violating it to all the penalties of other cases of bigamy."

"Section 2. No proceedings for reversing, vacating, or modifying any decree of divorce, except in so far as such proceedings shall affect only alimony, property rights, custody of children, and other matters not affecting the marital relations of the parties, shall be commenced unless within six months after the rendition of such decree, or in case the person entitled to such proceedings is an infant, a person of unsound mind, within six months, exclusive of the time of such disability."

From a careful reading of these sections, we are of opinion that they will not bear the construction sought to be placed upon them. Prior to the passage of this act, proceedings in error in all cases might be brought in the supreme court within one year. The legislature seems to have concluded that, so far as decrees of divorce were concerned, error proceedings, except as affecting children and property rights, should be commenced in the supreme court within six months, the time already limited for appeals, and to effectuate this purpose, enacted the sections quoted. It is apparent to us that the sections referred to will not bear the construction contended for. If any doubt existed as to the meaning of this enactment, we would be at liberty to look to the title of the act to aid the construction, which is in the following language:

"An act to prevent the marriage of divorced persons during the time allowed for proceedings to reverse the decree of divorce, and during the pendency of such pro-

ceedings, and to fix the time within which such proceedings may be commenced."

The language used in the title, even if the meaning of the sections themselves were not clear, shows, beyond question, that the act was only intended to apply to proceedings commenced in the supreme court.

Appellee contends that, because the act permits parties to marry after six months, if no proceedings to reverse have been commenced, therefore, it was intended to apply as well to proceedings commenced in the trial court; and that, being an act complete within itself, it repeals by implication the provisions of section 602. It is probably true that parties may marry again after six months from the date of the decree, if no error or appeal proceedings have been commenced; but there is no doubt that in so doing they must take their chances on having the decree vacated upon a proper application under the provisions of section 602, and, in such event, must bear the consequences that flow from a vacation of the decree, since all persons are charged with knowledge of the law. Repeals by implication are not favored, and a construction which results in an implied repeal of some other enactment should only be resorted to when made necessary by the evident intent of the legislature. In the case at bar there is no necessity to adopt such construction. The language of the sections quoted is plain, and we can not see that they deprive appellant of any rights granted by section 602.

It follows from what has been said that the trial court erred in sustaining the demurrer to the petition of appellant, and it is therefore recommended that the judgment be reversed.

DUFFIE and LETTON, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is reversed and the cause remanded for further proceedings.

REVERSED.

## HARRY L. MCCONNELL V. P. E. MCKILLIP.

FILED APRIL 21, 1904. No. 13,308.

1. **Game Laws: POLICE POWER. CONSTITUTIONAL LAW.** Under the police power of the state, the legislature has power to declare property which may be used only for an unlawful purpose to be a public nuisance and authorize the same to be abated summarily by public officers, but, if property, of a nature innocent in itself and susceptible of a beneficial use, has been used for an unlawful purpose, a statutory provision subjecting it to summary forfeiture to the state as a penalty or punishment for the wrongful use, without affording the owner thereof opportunity for a hearing, deprives him of his property without due process of law.
2. **Act Unconstitutional.** Section 3, article III, chapter 31 of the Compiled Statutes, in so far as it provides for the seizure, forfeiture and transfer of title to property without providing for a hearing, held unconstitutional and void.

ERROR to the district court for Boone county: JAMES N. PAUL, JUDGE. *Affirmed.*

*F. N. Prout, Attorney General, Norris Brown, William B. Rose and C. E. Spear, for plaintiff in error.*

*H. C. Vail, contra.*

LETTON, C.

On the 3d day of August, 1902, P. E. McKillip, D. B. McMahon and W. E. Harvey were engaged in hunting prairie chickens in Boone county, in violation of the game law of 1901, using three shotguns. The deputy game warden, Harry L. McConnell, seized the three shotguns, while they were so engaged in hunting prairie chickens. P. E. McKillip was the owner of the guns, which were valued at the sum of \$75. McKillip brought an action of replevin against the defendant, deputy game warden, for their possession. The case was tried to the district court upon an agreed statement of facts substantially as above stated. The court found for the plaintiffs and rendered judgment accordingly. The defendant



brings error to this court. The game warden claims the right to hold the guns under authority of section 3, article 3, chapter 31 of the Compiled Statutes (Annotated Statutes, 3272), which is as follows:

"All guns, ammunition, dogs, blinds and decoys, and any and all fishing tackle, in actual use by any person or persons while hunting or fishing in this state without license or permit, when such license or permit is required by this act, shall be forfeited to the state; and it is made the duty of the commissioner and every officer charged with the enforcement of this act to seize, sell or dispose of the same in the manner provided for the sale or disposition of property on execution, and to pay over the proceeds thereof to the county treasurer for the use of the school fund."

He contends that the statute authorizing game wardens to seize and forfeit to the state all guns in actual use by persons hunting in violation of the game law is a valid exercise of the police power of the state, while the defendant in error contends that the aforesaid statutory provision violates the provisions of the 14th amendment to the constitution of the United States which declares: "Nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws," and of section 3, article I of the constitution of the state of Nebraska, which provides: "No person shall be deprived of life, liberty or property, without due process of law."

The protection of wild animals suited for the purpose of food from indiscriminate slaughter by hunters has been the object of legislation from the most ancient times. The theory upon which the lawmaking power assumes to act is, that all wild game belongs to the state in its sovereign capacity as a trustee for the whole of the public, and that, consequently, the state may, as a proper exercise of its police power, adopt such rules and regulations with reference to its preservation, and such penalties with reference

to a violation of such regulations, as are necessary to accomplish the end desired—the preservation to the people of the state of the pleasure, sport and profit derived from the hunting, pursuit and capture of the wild animals living therein.

In this case the defendant in error, McKillip, admits that it is within the power of the state, in the just exercise of its police powers, to prohibit the killing of fish and game at certain seasons of the year, but denies that it has the right to take his property from him and confiscate it to the state without giving him his day in court. He contends that the police power in regard to the confiscation of guns, dogs, blinds, decoys and fishing tackle is upon exactly the same footing as the police power in regard to the regulation of the sale of intoxicating liquors, and that, since, before liquors which have been seized are destroyed, there must be a judicial determination by a court as to whether the owner was engaged in unlawfully selling or keeping for sale intoxicating liquors, so there must be as to his property. He further contends that, since the statute contains no provisions for determining whether the property was liable to condemnation for the criminal acts of those who had it in their possession, and since it merely authorized the game warden to seize the property without warrant or process, to condemn it without proof, and to sell it as upon execution, it deprives the defendant of the property rights which are guaranteed to him by the constitution.

The laws of the state of New York declare that any net or other means or device for taking fish found in the waters of the state, in violation of the laws for the protection of fish, is a public nuisance, and authorize game constables to destroy such nets. Certain nets were seized and destroyed, and an action being brought against the officers for their value under these provisions, the court of appeals of the state of New York held that the declaration by the legislature that the nets or other devices found in the waters of the state are a public nuisance, is a valid

exercise of the legislative power; and that the further provision requiring the destruction of such nets, such destruction being an incident of the power of abatement of the nuisance, and not a forfeiture inflicted as a penalty upon the owner, is not in violation of the constitutional prohibition of taking property without due process of law; but further held that that part of the act authorizing the destruction of nets found upon the shore was unconstitutional, since nets not found in the waters are not a nuisance *per se*. *Lawton v. Steele*, 119 N. Y. 226. A writ of error being sued out to the supreme court of the United States from this judgment, that court affirmed the judgment of the supreme court of New York, and say, Mr. Justice Brown delivering the opinion:

"The main, and only real difficulty connected with the act in question is in its declaration that any net, etc., maintained in violation of any law for the protection of fisheries, is to be treated as a public nuisance, 'and may be abated and summarily destroyed by any person, and it shall be the duty of each and every protector aforesaid and every game constable to seize, remove and forthwith destroy the same.' The legislature, however, undoubtedly possessed the power not only to prohibit fishing by nets in these waters, but to make it a criminal offense, and to take such measures as were reasonable and necessary to prevent such offenses in the future. It certainly could not do this more effectually than by destroying the means of the offense. \* \* \* In this case there can be no doubt of the right of the legislature to authorize judicial proceedings to be taken for the condemnation of the nets in question, and their sale or destruction by process of law. Congress has assumed this power in a large number of cases, by authorizing the condemnation of property which has been made use of for the purpose of defrauding the revenue. Examples of this are vessels illegally registered or owned, or employed in smuggling or other illegal traffic; distilleries or breweries illegally carried on or operated, and buildings standing upon or near the

boundary line between the United States and another country, and used as depots for smuggling goods. In all these cases, however, the forfeiture was decreed by judicial proceeding. But where the property is of little value, and its use for the illegal purpose is clear, the legislature may declare it to be a nuisance, and subject to summary abatement. Instances of this are the power to kill diseased cattle; to pull down houses in the paths of conflagrations; the destruction of decayed fruit or fish or unwholesome meats, or infected clothing, obscene books or pictures, or instruments which can only be used for illegal purposes. While the legislature has no right arbitrarily to declare that to be a nuisance which is clearly not so, a good deal must be left to its discretion in that regard, and if the object to be accomplished is conducive to the public interests, it may exercise a large liberty of choice in the means employed. *Newark & S. O. H. C. R. Co. v. Hunt*, 50 N. J. Law, 308; *Blazier v. Miller*, 10 Hun (N. Y.), 435; *Mouse's Case*, 12 Rep. (7 Coke) 63; *Stone v. Mayor*, 25 Wend. (N. Y.) 157, 173; *American Print Works v. Lawrence*, 21 N. J. Law, 248, 23 N. J. Law, 590." *Lawton v. Steele*, 152 U. S. 133.

The state of Wisconsin has an act substantially the same as that of New York, providing for the protection of fish and authorizing the destruction of nets, declaring the same to be public nuisances. In the case of *Bittenhaus v. Johnston*, 92 Wis. 588, the validity of this provision came before the supreme court of Wisconsin. The court say, it has been repeatedly said, neither the 14th amendment, nor any other amendment to the constitution of the United States, "was designed to interfere with the power of a state, sometimes termed its 'police power,' to prescribe regulations to promote the health, peace, morals, education, and good order of the people, and to legislate so as to increase the industries of the state, develop its resources, and add to its wealth and prosperity." *Barbier v. Connolly*, 113 U. S. 31; *Mugler v. Kansas*, 123 U. S. 623; *In re Kemmler*, 136 U. S. 436, 448." The court

further say: "The plaintiff, having voluntarily put the nets to an unlawful use which made them public nuisances under the statute, is in no position to recover damages from the defendants for having, as public officials, obeyed the law in abating the nuisance by seizing and destroying the nets. Of course, the plaintiff had his right of action to determine whether the nets were or were not in such unlawful use. We must hold that the plaintiff has not been deprived of his property without due process of law."

No case has been brought to our attention in which a court has construed a statute which provides for the seizure, forfeiture to the state and sale of property of the kind involved in this case, which has been used in violation of the game laws. As a rule the statutes have declared nets and like devices, which can only be used in violation of law, to be public nuisances, and provided for their abatement by their destruction by public officers.

The distinction between nets, which under the laws of the states providing for their destruction can only be used for an unlawful purpose, and fire arms which under the laws of this and other states may be used for many other purposes, innocent and lawful in their nature, is clearly apparent, and has been recognized by our legislature in the act under consideration.

In section 1, article III of this act, the legislature of this state has provided:

"Every net, seine, trap, explosive, poisonous or stupefying substance or device used or intended for use in taking or killing game or fish in violation of this act, is hereby declared to be a public nuisance and may be abated and summarily destroyed by any person, and it shall be the duty of every such officer authorized to enforce this act to seize and summarily destroy the same, and no prosecution or suit shall be maintained for such destruction; provided, that nothing in this division shall be construed \* \* \* as authorizing the seizure or destruction of fire arms, except as hereinafter provided."

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The provisions of this section as to nets and like devices are substantially the same as those contained in the game laws of New York and Wisconsin, heretofore referred to, and with the conclusions of these courts with reference to laws of like nature, we have no fault to find. But there is a broad distinction between this section and section 3 under which the plaintiff in error justifies.

The legislature has not declared a gun to be a public nuisance and has not ordered its destruction as an abatement of the same. The seizure of the property provided for by this section is evidently intended, not only to put it out of the power of the offending person to carry on the destruction of game by depriving him of the implement of destruction, but also to operate as a penalty or punishment for an unlawful act committed by him. It is of the nature of a common law forfeiture of goods upon conviction of a crime.

In *Ieck v. Anderson*, 57 Cal. 251, it appeared that the plaintiff had rented certain boats and nets to a Chinese fisherman; that the property was used in violation of a statute of the state which provided that all nets, seines, fishing tackle, boats and other implements used in catching or taking fish in violation of the provisions of this chapter shall be forfeited, or may be seized by a peace officer of the county or his assistant, and may be by him destroyed or sold at public auction, upon notice posted in the county for five days. The court held that so much of the statute as authorized the property to be sold without judicial proceedings was unconstitutional and void. It will be noticed that boats were included, which were susceptible of a lawful use.

*Varden v. Mount*, 78 Ky. 86, was an action in conversion to recover the value of certain hogs. The town ordinance provided that it was the duty of the town marshal to take up hogs running at large upon the streets, to advertise them for three days, and to offer them at public sale to the highest bidder, and, after paying the expenses thereof, to pay over to the rightful owner the balance, if

any. The court held the right to forfeit "should not be extended beyond impounding the hogs. When that is done, the necessity for summary and precipitate action ceases, and judicial proceedings looking to forfeiture may then properly begin," and that the ordinance was unconstitutional.

*Lowry v. Rainwater*, 70 Mo. 152, was an action to recover the value of a dining table. The defendant pleaded that he was a member of the board of police commissioners of the city of St. Louis, and that under the statute it was his duty, when he had knowledge that there was a prohibited gaming table kept or used in the city of St. Louis, to issue a warrant directing some officer of the police force to seize and bring before him such gaming table, and made it his duty to cause the same to be publicly destroyed by burning or otherwise. These provisions were held unconstitutional and void.

In *Lawton v. Steele*, 119 N. Y. 226, the supreme court of New York was of the opinion that it was only because the nets found in the water were a public nuisance that they might be destroyed, and that if the destruction of the nets was intended as a penalty it was unconstitutional, and also that nets not actually found in the water could not be seized. "But," say the court, "the legislature can not go further. It can not decree the destruction or forfeiture of property used so as to constitute a nuisance as a punishment of the wrong, nor even, we think, to prevent a future illegal use of the property, it not being a nuisance *per se*, and appoint officers to execute its mandate. The plain reason is that due process of law requires a hearing and trial before punishment, or before forfeiture of property can be adjudged for the owner's misconduct. Such legislation would be a plain usurpation by the legislature of judicial powers, and under guise of exercising the power of summary abatement of nuisances, the legislature can not take into its own hands the enforcement of the criminal or *quasi* criminal law. See opinion of Shaw, C. J., in *Fisher v. McGirr*, 1 Gray, 1, and

in *Brown v. Perkins*, 12 Gray, 89." When the same case reached the supreme court of the United States, while the majority of the court held that the law in question was a valid exercise of the police power, Chief Justice Fuller, with whom concurred Mr. Justice Field and Mr. Justice Brown, filed a dissenting opinion, in which he says: "The police power rests upon necessity and the right of self protection, but private property can not be arbitrarily invaded under the mere guise of police regulation, nor forfeited for the alleged violation of law by its owner, nor destroyed by way of penalty inflicted upon him, without opportunity to be heard." *Lawton v. Steele*, 152 U. S. 133, 144.

In *Sentell v. New Orleans & C. R. Co.*, 166 U. S. 698, it is said by Justice Brown: "But in determining what is due process of law we are bound to consider the nature of the property, the necessity for its sacrifice, and the extent to which it has heretofore been regarded as within the police power. So far as property is inoffensive or harmless, it can only be condemned or destroyed by legal proceedings, with due notice to the owner; but so far as it is dangerous to the safety or health of the community, due process of law may authorize its summary destruction."

In *Colon v. Lisk*, 153 N. Y. 188, a later case than *Lawton v. Steele*, a statute, providing that every vessel unlawfully used in interfering with oysters planted in the waters of the state may be seized by the game protectors, and upon six days' notice a justice might take evidence and, if found to be so engaged, the vessel should be ordered sold and the proceeds paid to the commissioners of fisheries, game and forestry, was held unconstitutional, the court saying: "It is to be observed, in passing, that the use for which vessels and fixtures may be forfeited under this act does not constitute a nuisance, either at common law, or under this, or any other statute. Nor is the property itself a nuisance. Hence, it is obvious that the validity of this act can not be maintained upon the



ground that either the act or the property is a public nuisance, and, consequently, that the legislature had the power to authorize its abatement."

In *Chicago, B. & Q. R. Co. v. State*, 47 Neb. 549, 565, this court held: "The legislature can not, under the guise of a police regulation, arbitrarily invade private property or personal rights," but it must appear to the court, when such regulation is called in question, that there is a "clear and real connection between the assumed purpose of the law and its actual provisions."

There is a clear and marked distinction between that species of property which can only be used for an illegal purpose, and which therefore may be declared a nuisance and summarily abated, and that which is innocent in its ordinary and proper use, and which only becomes illegal when used for an unlawful purpose. We know of no principle of law which justifies the seizure of property, innocent in itself, its forfeiture and the transfer of the right of property in the same from one person to another as a punishment for crime, without the right of a hearing upon the guilt or innocence of the person charged, before the forfeiture takes effect. If the property seized by a game keeper or warden were a public nuisance, such as provided for in section one, he had the right under the duties of his office at common law to abate the same without judicial process or proceeding, and the great weight of authority is to the effect that such common law rights have not been abrogated or set aside by the provisions of the constitution; but if the property is of such a nature that, though innocent in itself and susceptible of a beneficial use, it has been perverted to an unlawful use, and is subject to forfeiture to the state as a penalty, no person has a right to deprive the owner of his property, summarily, without affording opportunity for a hearing and without due process of law. The usual course of proceedings in such case has been either, as in admiralty and revenue proceedings, to seize the property, libel the same in a court of competent jurisdiction and have it con-

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demned by that court, or, as in criminal matters, to arrest the offender and to provide that upon his conviction the forfeiture of the property to which the offender's guilt has been imputed, and to which the penalty attaches, should take place. These have been the methods of procedure for centuries. No other has been pointed out to us in the brief of the plaintiff in error. We are therefore constrained to the opinion that, in so far as the section under consideration provides for the seizure, forfeiture and transfer of title to property without a hearing upon the guilt or innocence of its owner, it violates the constitutional provisions. Whether or not a forfeiture can be provided for as a punishment for crime under our constitution is a question not raised or decided in this case.

We recommend that the judgment of the district court be affirmed.

DUFFIE and KIRKPATRICK, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is

AFFIRMED.

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HELEN L. JONES V. ALICE S. DANFORTH.

FILED APRIL 21, 1904. No. 13,362.

1. **Creditor's Bill: ATTACHMENT: JURISDICTION.** When a creditor's bill is brought to set aside a cloud upon the title of property which has been seized in an attachment suit against a nonresident debtor, the court will look at the entire record in the attachment case to see whether jurisdiction was obtained therein. If from all the affidavits the essential facts to confer jurisdiction appear, the judgment will not be declared void. The defect in one affidavit may be supplied by the other and, if enough appears from all, it is sufficient.
2. **Attachment: PROCESS: JUDGMENT.** A judgment rendered without substituted service on the defendant in an attachment case against a nonresident, whose property has been seized in this state, is merely erroneous and not void. *Darnell v. Mack*, 46 Neb. 740, followed.

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3. ———: ———: ———. If it appears that service of summons has actually been made upon the defendant and that the time given him by the summons to answer has elapsed before judgment, the fact that an error was made in the return day of the summons is merely an irregularity, which might have been taken advantage of by the defendant before judgment, but which does not render the judgment void.
4. **DEED: RECORD: NOTICE: STATUTE OF LIMITATIONS.** The recording of a fraudulent deed is not of itself, under all circumstances, sufficient to charge all parties with notice of the fraud. When accompanied with circumstances sufficient to put a person of ordinary intelligence and prudence upon inquiry which, if pursued, would lead to the discovery of the fraud, the statute begins to run from the recording of the deed, but not otherwise. *Forsyth v. Easterday*, 63 Neb. 887, followed.

ERROR to the district court for Clay county: **GEORGE W. STUBBS, JUDGE.** *Affirmed.*

*Thomas H. Matters*, for plaintiff in error.

*Joel W. West*, *contra.*

**LETTON, C.**

This was a creditor's bill brought by Alice S. Danforth, as plaintiff, against Helen L. Jones, L. D. Fowler and others. It appears that L. D. Fowler is the father of the defendant Helen L. Jones; that at one time he had been in partnership with one Cowles, the former husband of the plaintiff; that Cowles died in 1890, and, after his death in 1893, she loaned Fowler, who was then in the banking and farm loan business, about \$8,000, Fowler giving his unsecured promissory note for the same. That this note was renewed from time to time, and that, at the time the last note was given in 1901, Fowler gave her a second mortgage on some property in Omaha to secure the same, which property was afterwards taken by the foreclosure of the first mortgage, so that she received nothing upon the note. Fowler at one time resided in Clay county, Nebraska, afterwards moving to Omaha and living there in 1893 when the money was loaned to him,

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and is now a resident of Washington, D. C. In February, 1902, Mrs. Danforth commenced an action in the district court for Clay county against Fowler, to recover the amount due upon the note, at the same time filing an affidavit for attachment and garnishment, alleging among the grounds therefor that the defendant was a nonresident of the state of Nebraska, and that the affiant had good reason to believe and does believe that each of two corporations, named in the affidavit, within the county of Clay, have possession of property of the defendant Fowler, describing it. A writ of attachment and garnishment was issued by virtue of the affidavit, and was levied by the sheriff of Clay county upon numerous parcels of real estate and shares of stock as the property of the defendant L. D. Fowler. On the same day that the petition was filed, an affidavit for service by publication was made and filed in the case, which stated the object and prayer of the petition was to recover the amount due upon a promissory note, and "that the plaintiff has procured a writ of attachment in said action, by which it is sought to subject to the payment of said debt all the rights, credits, goods and chattels, lands and tenements of said L. D. Fowler, which may be found in said Clay county and state of Nebraska. Affiant further says that said defendant L. D. Fowler is a nonresident of Nebraska and that service of summons can not be made within this state upon him." Summons was personally served upon Fowler in the District of Columbia by a person regularly appointed to serve the same, no appearance was made by the defendant, and, upon the hearing on the 24th day of March, 1902, a judgment was rendered in the case for the amount due, and ordering the sheriff to proceed, as upon execution, to advertise and sell so much of the attached property as will satisfy the judgment and costs. After this judgment had been rendered, it appearing that the attached property had been transferred by Fowler to the defendants herein, this action was begun for the purpose of clearing the title to the attached property so that it

might sell to advantage under the order of sale. No consideration was paid by Mrs. Jones to Fowler for any of the property.

The defendant contends that the evidence fails to show that the plaintiff was a judgment creditor of L. D. Fowler. Her position is that the judgment was absolutely void for the reasons: First, that the summons was served after the return day: Second, that the affidavit on which the service was based failed to show the existence of grounds for service by publication or personal service out of the state.

For convenience, we will consider the second assignment first. The argument of the defendant is that the language of the affidavit for service by publication, "That the plaintiff has procured a writ of attachment in said action, by which it is sought to subject to the payment of said debt all the rights, credits, goods and chattels, lands and tenements of said L. D. Fowler, which *may* be found in said Clay county and state of Nebraska," does not show that Fowler had any property in Clay county or in Nebraska, and, therefore, does not show that the court had jurisdiction to enter a judgment *in rem*, and that it is equivalent to a declaration that the plaintiff would subject, under her writ, any property belonging to Fowler in Clay county or state of Nebraska, if he had any therein, and that, in order to be sufficient, it was necessary to state that property of Fowler had been taken under the writ or that he had property or credits in this state.

It is questionable whether if this affidavit for publication stood alone it would furnish the proof of sufficient facts to warrant service by publication, but the record shows that, upon the same day, an affidavit in attachment and garnishment was filed which alleged, in the language of the statute, that the affiant "has good reason to believe and does believe" that certain corporations within the county of Clay each has in its possession property of the defendant L. D. Fowler, describing, specifically, the prop-

erty which it is charged each holds; and the record further shows, that an order of attachment was issued under the affidavit, and that, on the 11th day of February, the personal property described was attached, and that, on the 21st day of March, certain real estate of the defendant Fowler was also attached in Clay county. Judgment was rendered in the action upon the 24th day of March. At the time that judgment was rendered, the court found that due and legal service of summons had been made personally upon the defendant. In *Miller v. Eastman*, 27 Neb. 408, the facts were, that an action was brought in the district court for Otoe county to recover upon a promissory note. The defendant was a nonresident of this state. An affidavit for attachment was filed, setting forth, among other matters, that the defendant is a nonresident of the state of Nebraska, and that the affiant makes this affidavit for the purpose of procuring an order of attachment in said action. The affidavit for publication set forth the object of the action, that the defendant is a nonresident of the state of Nebraska, that service of summons can not be made upon the defendant within the state of Nebraska, and that affiant makes this affidavit for the purpose of procuring service upon said defendant by publication in manner prescribed by law. These affidavits were filed when the action was begun. It was objected that the district court never acquired jurisdiction in the attachment proceedings, but the court say:

"It will be observed that the affidavit complies substantially with the statute and is sufficient. And in a case of this kind, the court will look at the entire record, and if it appear from all the affidavits before the court issuing the attachment that the essential facts to confer jurisdiction were duly sworn to therein, the judgment will not be declared void; therefore, even if the affidavit for publication was defective, the defect is supplied by the affidavit for attachment, and is thereby cured. The court, therefore, in any view of the case, had jurisdiction and its judgment is not subject to collateral attack."

In *Welch v. Ayres*, 43 Neb. 326, it is held that the right to institute and prosecute an action against a nonresident debtor for the recovery of money only, and to serve summons upon him by publication under the third clause of section 77 of the Code, depends as much upon the existence of the fact of the defendant's ownership of the property within the state as upon the fact of his non-residence, and the existence of both facts is essential to the validity of the proceedings. That service by publication can only be had against a nonresident who has property in this state, and that it is proper and competent for the court to hear testimony as to whether or not the defendant owned property in the state, to determine the question of jurisdiction. If it is clear, as is held in that case, that the defendant may show that he owns no property within this state, then jurisdiction does not depend alone upon the averments in the affidavit for publication. If the affidavits show even in inapt or unskillful language that the defendant has property in the state, and property is afterwards seized under the writ of attachment, then jurisdiction is complete. In this state the court acquires jurisdiction over the *rem* by its seizure, and failure to give the notice does not thereby cause the court to lose jurisdiction so long as the action remains pending. The main question raised has been discussed and the law settled by the well considered opinion of Commissioner IRVINE in *Darnell v. Mack*, 46 Neb. 740, in which it is held that a judgment rendered without substituted service on the defendant in an attachment case against a nonresident whose property has been seized in this state is merely erroneous and not void. See also *Rachman v. Clapp*, 50 Neb. 648; *Brown v. Bose*, 55 Neb. 200.

By the affidavit for attachment and garnishment, the service of the notice upon the garnishee thereunder and the levy of the writ of attachment the plaintiff acquired a lien upon the property of the judgment debtor in this state. The return of the officer showing these facts was proper to be considered by the district court upon the

question of jurisdiction before the judgment was rendered. At the time of the rendition of the judgment, these facts were all before the court, it passed upon the question of service, and the judgment, so far as it subjects the attached property to its payment, is proof against collateral attack.

As to the objection to the time of service of the summons, it appears that the summons was issued to the sheriff of Clay county and was made returnable upon the fourth Monday after its date. The requirement of the statute is that it be made returnable upon the second Monday after the date thereof, and that, if issued to another county, it may be made returnable at the option of the plaintiff upon the third or fourth Monday after its date. The service was made and the summons returned within the time specified upon its face, but the argument of the defendant is that the clerk had no authority to extend the return day from the second until the fourth Monday, that his action in doing so was a nullity, and that therefore the summons was returned after the return day and was therefore wholly void. The question of the effect that the inserting of an erroneous return day in a summons has upon the service made under such circumstances, was before this court in *Ley v. Pilger*, 59 Neb. 561, and it was there held that this defect is merely an irregularity and does not render the process void.

Where there is actual personal service of process upon the defendant, and the defendant does not appear and object on the ground of irregularity in the summons, and a judgment is rendered against him under such service, the judgment is not void but voidable, and is not open to collateral attack. It appears that Fowler was actually served with the summons and that time was given him to answer. The fact that an erroneous date was mentioned as the date of the return of the summons might have been taken advantage of by him by proper motion. This not having been done, and a judgment rendered wherein the court considered the question of



service, its judgment in that respect is final. *Gandy v. Jolly*, 35 Neb. 711; *Campbell Printing Press & Mfg. Co. v. Marder*, 50 Neb. 283.

The defendant's second proposition is that the plaintiff's action is barred by the statute of limitations, for the reason that the deed of conveyance of the real estate was dated April 17, 1897, and was recorded in the office of the county clerk of Clay county upon April 23, 1897. This action was begun upon April 24, 1902, which was 5 years after the recording of the deed. Our statute provides that an action for relief on the ground of fraud must be brought within 4 years, but the cause of action in such case shall not be deemed to have accrued until the discovery of the fraud. The shares of stock in the corporations were transferred upon the books of the corporations in September, 1896. There is no evidence to show that the plaintiff had any knowledge of Fowler's ownership of this stock before he transferred it, or of the transfer of the same until a short time before the beginning of this action. As to the transfer of such shares of stock she had no notice or knowledge, either actual or constructive, until within 2 years before her action was begun, and hence her right to reach the same has not been barred by the statute of limitations.

As to the real estate, at the time the deed to the same was recorded, it was sent by Fowler from Washington, D. C., to the county clerk of Clay county for record and, after recording, was returned to him at the same place. There is no evidence in the record to show at what time, if ever, it was delivered to Mrs. Jones. When the deed was recorded, the property had only been conveyed to Fowler about 9 months previously. The parties were divided by the width of the continent. Fowler had not lived in Clay county for more than 6 years, and Mrs. Danforth was a resident of Los Angeles, California, and had never lived in Clay county. The note sued upon in the attachment suit was dated 37 days after the fraudulent transfer of the real estate was made, and nearly 18

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months after the certificates of stock had been transferred. At the time the note was given, Fowler stated to the plaintiff that the Omaha property was all that he had and all that he could give her. The rule undoubtedly is, in this state, that, in an action brought more than 4 years after the recording of a conveyance seeking to set the same aside as fraudulent, the plaintiff must show that the circumstances were not such as to put a person of ordinary intelligence and prudence upon inquiry which, if pursued, would lead to a knowledge of the fraud. The recording of a deed is a circumstance strongly tending to show knowledge or the means of knowledge, but the circumstances of each case must govern. The same strictness is not to be enforced where the parties live at a distance from the county where the real estate lies, and where the plaintiff in the case had no knowledge that any property stood in the name of the judgment debtor in that county, as where both parties live in the county where the land lies, or are so situated in other respects that knowledge could fairly and reasonably be presumed from all the circumstances of the case. There may be circumstances under which the recording of a fraudulent deed to his real estate by a debtor is sufficient to put the creditor upon inquiry which, if pursued, would lead to the discovery of the fraud, and thereby amount to a discovery of the fraud sufficient to set the statute in motion, but the fact of the recording of the fraudulent deed is not of itself alone sufficient to charge the creditor with notice of the fraud. That part of the syllabus in *Gillespie v. Cooper*, 36 Neb. 775, as follows: "It seems that the fraud, within the meaning of said section 12, is discovered when the fraudulent deed is recorded in the county where the debtor lives," is disapproved, and the rule followed which is announced in *Forsyth v. Easterday*, 63 Neb. 887, as follows: "The recording of a fraudulent deed is not of itself, under all circumstances, sufficient to charge all parties with notice of the fraud. When accompanied with circumstances sufficient to put a person

of ordinary intelligence and prudence upon inquiry, which, if pursued, would lead to a discovery of the fraud the statute begins to run from the recording of the deed, but not otherwise."

In this case, where the creditor and debtor lived 5,000 miles apart, and the property which was fraudulently conveyed was situated in Nebraska, where neither resided, where the evidence showed that the debtor had owned the property only a few months before the transfer, and stated to the creditor, at the time he executed the note which was sued upon, that he had no other property except that upon which he was then giving her a second mortgage, where some degree of trust and confidence between the parties might exist from the former close business relations of the plaintiff's former husband with the debtor, and where it is proved that the plaintiff had no actual knowledge of the fraudulent transfer until a short time before the beginning of this action, her right to bring the same has not been barred by the statute.

The defendant's third proposition is that the plaintiff was a subsequent creditor and, under the state of pleadings and evidence, is not entitled to relief against the defendants. This argument is based upon the fact that the fraudulent conveyances were made a short time before the giving of the note which was afterwards merged in the judgment, and upon the theory that the giving of the new note paid the antecedent debt, and, consequently, made the plaintiff a subsequent creditor who would have no right to complain of any voluntary conveyance made by the debtor before the debt was contracted. It seems to us that this contention merits slight consideration.

It is nowhere alleged in the defendant's answer that the debt which existed, at the time of the transfers complained of, had been fully settled and discharged by Fowler, at the time of the giving of the new note; and it is clear that, where a note is merely given in renewal of a former note, this fact does not change the relations between the parties with reference to a fraudulent transfer

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of his property by the debtor. "According to the general doctrine a promissory note, though negotiable, given by a debtor to his creditor, does not operate as payment of a preexisting indebtedness, in the absence of an agreement between the parties that it shall so operate." 22 Am. & Eng. Ency. Law (2d ed.), 555, and cases cited. That this note was taken in payment of the debt has neither been pleaded nor proved, and hence this contention can not be sustained.

For these reasons, we recommend that the judgment of the district court be affirmed.

DUFFIE and KIRKPATRICK, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is

AFFIRMED.

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HENRY C. CUTLER ET AL., APPELLEES, v. N. H. MEEKER  
ET AL., APPELLANTS.

FILED APRIL 21, 1904. No. 13,535.

1. Decedent's Estate: LANDS UNDER CONTRACT OF PURCHASE. The interest of a vendee in possession of real estate under a contract of sale, part of the purchase price of the land having been paid, at his death, descends to his heirs, and does not pass to his administrator. It is alienable, descendible and devisable in like manner as if it were real estate held by a legal title.
2. Action to Quiet Title: DOWER: TRUSTS. Where, by the mutual consent of the heirs and the widow of a deceased vendee in possession under contract of sale of school lands from the state of Nebraska, the equitable interest therein has been treated as if it were real estate of which the decedent died seized, and dower therein has been assigned to the widow, a deed issued to her in her own name by the state for the portion of the land assigned to her as dower, upon her payment of the balance due *pro tanto* under the contract, creates no new right in her as against the heirs; the title she thereby acquired inures to their benefit and, in equity, she took the legal title only as trustee for them.

APPEAL from the district court for Cass county: PAUL JESSEN, JUDGE. *Affirmed.*

*Byron Clark and Samuel M. Chapman, for appellants.*

*C. S. Polk and O. B. Polk, contra.*

LETTON, C.

Martin B. Cutler, a resident of Cass county, Nebraska, died on the 29th day of March, 1885, intestate, leaving a widow, Gertrude Cutler, and two sons, Henry C. Cutler and George H. Cutler, his only heirs. Prior to his death, Martin B. Cutler had purchased from the state of Nebraska 520 acres of school lands in Cass county, and had made the first payment of one-tenth upon the principal, and also part of the interest upon the deferred payment, the balance of the principal not being due until 20 years from date of purchase. Under the contract he was bound to pay the interest at 6 per cent. per annum annually, in advance, upon the deferred payments, until the principal became due. At the time he died, Cutler was in possession of the 520 acres of land referred to, and also was seized in fee of a 10 acre tract of timber land adjoining the same. After his death, letters of administration were granted in the probate court of Cass county to his widow and his oldest son, as joint administrators, upon a petition for administration signed by Gertrude Cutler and George H. Cutler, which alleged, among other things, that Martin B. Cutler died seized and possessed of real and personal estate, consisting of farm lands, live stock and implements. On the 11th day of July, 1885, an inventory was filed in the county court of Cass county, signed and sworn to by George H. Cutler and Gertrude Cutler, describing the real estate as in the petition and setting forth its value as if held in fee.

On the 9th day of September, 1885, the petition of Gertrude Cutler was presented to said county court, alleging

that Martin B. Cutler died seized of real estate, described as in the petition. That the heirs, and the only persons interested in said lands, are George H. Cutler and Henry C. Cutler. That she is entitled to dower in all of said lands; and her right thereto is not disputed by the said heirs or any person claiming under them or either of them. On the next day, the court rendered a decree, after finding that said Gertrude Cutler is the widow of the deceased, and ordering that she be endowed of one-third part of the premises described in the petition of said Gertrude Cutler, and appointing commissioners to assign dower. The commissioners appointed to assign dower duly acted, and made their report setting apart the 200 acres of land in controversy to Gertrude Cutler as her dower in the estate of Martin B. Cutler. On the 23d day of December, 1886, a decree of confirmation of the report of the commissioners was rendered by the county court, and it was "ordered that said Gertrude Cutler have the use and possession of the land so assigned during her life."

On the 27th day of June, 1887, the administrators, Gertrude Cutler and George H. Cutler, having filed their final report, the county court, after due notice given, found that the residue of personal property in the hands of the administrators was \$4,106.40, and found further that the deceased died seized of all the real estate heretofore mentioned; that he left surviving him Gertrude Cutler, his widow, George H. Cutler and Henry C. Cutler his only heirs; and ordered that the residue of the personal estate be assigned to the widow and the heirs, one-third part to each, and that the real estate be assigned to the two sons, to each an undivided one-half, subject, however, to the assigned dower rights of Gertrude Cutler. After the assignment of dower had been made to the widow, the remaining land was divided between the two sons by agreement, and each took possession of his share, the widow taking possession of the land assigned to her as dower. Each of the sons paid the balance remaining

due to the state of Nebraska upon the respective tracts occupied by them, and Gertrude Cutler kept up the interest payments and finally made final payment to the state of Nebraska upon the 200 acres of land occupied by her. A deed was issued to her in her own name, as grantee, by the state of Nebraska for said lands, dated on the 25th day of October, 1897. Gertrude Cutler afterwards died, leaving a last will and testament by which the 200 acres of land were devised to the defendants. Henry C. Cutler and George H. Cutler brought an action in the district court for Cass county, setting forth the facts substantially as above, and praying that a judgment be entered finding that they are the owners of the 200 acres of land; that Gertrude Cutler, by the conveyance which she received from the state of Nebraska, took the legal title to the land in trust for their use, and asking that title be quieted in them as against her devisees, the defendants. The defendants, claiming under the will of Gertrude Cutler, asserted that, since Martin B. Cutler was 2 years in default at the time of his death, he had forfeited his right to the contract of purchase of the land; that the land was divided and that, by the subsequent payment by Gertrude Cutler of the full amount due upon said land and the conveyance of the same to her by the state of Nebraska, she took and received a perfect title in fee to the premises. They further claim by adverse possession.

The facts in this case are virtually undisputed. At the time of the death of Martin B. Cutler, he was possessed of an equitable interest in the tract of land purchased by him from the state of Nebraska: Under the law in this state, his widow had no right to dower in this equitable estate. *Crawl v. Hurrington*, 33 Neb. 107; *Hall v. Crabb*, 56 Neb. 392. He was not seized in fee of the premises, but had merely an equitable estate, subject to be defeated by forfeiture for nonpayment of interest at any time. At the time of the final settlement of Cutler's estate, there was in the hands of the administrators the sum of \$4,106.40. There was afterwards paid by the heirs and Gertrude

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that Martin B. Cutler died seized of real estate, described as in the petition. That the heirs, and the only persons interested in said lands, are George H. Cutler and Henry C. Cutler. That she is entitled to dower in all of said lands; and her right thereto is not disputed by the said heirs or any person claiming under them or either of them. On the next day, the court rendered a decree, after finding that said Gertrude Cutler is the widow of the deceased, and ordering that she be endowed of one-third part of the premises described in the petition of said Gertrude Cutler, and appointing commissioners to assign dower. The commissioners appointed to assign dower duly acted, and made their report setting apart the 200 acres of land in controversy to Gertrude Cutler as her dower in the estate of Martin B. Cutler. On the 23d day of December, 1886, a decree of confirmation of the report of the commissioners was rendered by the county court, and it was "ordered that said Gertrude Cutler have the use and possession of the land so assigned during her life."

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Cutler, severally, to the state of Nebraska, in full for the balance remaining due upon the whole 520 acres of land, \$3,624.14, so that the whole amount necessary to be paid to the state, in order to procure a perfect title in fee simple to the whole tract of land, was in the hands of the administrators before final settlement of the estate, and might have been applied for that purpose. This was not done, but all parties interested in the estate elected to treat the equitable interest in the lands as if the decedent had died seized in fee of the same.

As to the contention of defendants, that the interest of Martin B. Cutler was forfeited at the time of his death, and that the state recognized Mrs. Cutler as the owner of the title, it is clear from the evidence that the state always recognized the title of Martin B. Cutler, and did, in fact, waive the forfeiture. No resale was ever had to Mrs. Cutler, and all the rights that the state recognized or gave her were based upon the contract with her husband. The deed which was issued to her was issued after an abstract of the probate proceedings, whereby the 200 acres were set apart to her had been sent to the land department of the state, and was made in accordance therewith. The receipts given upon the payment of interest show that the land was "sold to M. B. Cutler," and the letters and proceedings of the commissioner of public lands and buildings show that the state authorities executed the deed to her, believing that she had the right to complete the contract of purchase of Martin B. Cutler, and to receive a deed to the premises by reason of the same being awarded to her, as they mistakenly thought, by a decree of court.

Whatever rights, then, Mrs. Cutler had to the land she acquired through her husband's contract, and not adversely to it, and the right of her devisees, must be measured by that standard.

What was the actual and true interest of the heirs and the widow in the real estate at the death of Martin B. Cutler? Was it a mere personal interest that went to the

administrator or did it descend to the heirs? Is it of the nature of real or personal estate? If it descended to the heirs upon the death of Martin B. Cutler, they alone had the right to receive the deed from the state of Nebraska. In an early case in the supreme court of the United States this question was considered and the court say: Where an agreement is made to sell land, upon the execution of notes for the price and the title-bond, the vendor holds the legal title as trustee for the vendee, and the vendee is a trustee for the vendor as to the purchase money. "The seller under such circumstances has a vendor's lien. The equitable estate of the vendee is alienable, descendible and devisable in like manner as real estate held by a legal title. The securities for the purchase money are personalty, and in the event of the death of the vendor, they go to his personal representatives." *Lewis v. Hawkins*, 23 Wall. (U. S.) 119, 126. See also *Boone v. Chiles*, 10 Pet. (U. S.) \*177, \*225; 2 Story, Equity Jurisprudence (13th ed.), sec. 1212; *Hardin v. Boyd*, 5 Sup. Ct. Rep. 771; *Dorsey v. Hall*, 7 Neb. 460; 1 Dembitz, Land Titles, sec. 28; 2 Jones, Liens (2d ed.), sec. 1108, and cases cited.

This rule is recognized in the statutes of this state. Section 329, chapter 23, Compiled Statutes (Annotated Statutes, 5178), provides that, where any person who is bound by any contract to convey real estate shall die before making the conveyance, the person entitled thereto may bring specific performance to enforce the performance of the contract by the heirs, devisees or personal representatives of the deceased party who made the contract; and section 335, chapter 23, Compiled Statutes (Annotated Statutes, 5184), provides that, if the person to whom the conveyance was to be made should die before the commencement of proceedings or before the conveyance is completed, any person who would have been entitled to the estate under him as heir, devisee or otherwise, in case the conveyance had been made according to the terms of the contract, or the executor or administrator of such deceased person for the benefit of the person who was entitled

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to it, may commence such proceedings or may prosecute the same if already commenced, and the conveyance shall thereupon be so made as to vest the estate in the same person who would have been so entitled to it or in the executor or administrator for his benefit.

Also sections 94 to 98 inclusive of chapter 23, Compiled Statutes (Annotated Statutes, 4968-4972), provide that, if a deceased person at the time of his death was possessed of a contract for the purchase of land, his interest in such land and under such contract may be sold on the application of his executor or administrator in the same manner as if he had died seized of such land, and provide for proceedings by the administrator or executor whereby such sale may be made.

In *Hovorka v. Havlik*, 68 Neb. 14, it was contended by the plaintiff in error that a contract for the purchase of school lands from the state is personal property, the title to which passes to the administrator, and that he has the right to sell it the same as other personal property of the deceased. But this court say, after citing the statutory provisions:

"This statute, as we understand, was borrowed from the state of Michigan, and had as early as 1863 received a construction by the supreme court of that state by which it was held that 'under our probate system an administrator can not sell the interest of the estate in an executory contract for the purchase of lands, except as real estate and after license.' *Baxter v. Robinson*, 11 Mich. 519. But even in the absence of this statute and of its construction by the supreme court of Michigan, we can not believe that it was the intention of the legislature that valuable landed estates, held by the decedent under a contract of purchase, should pass to the administrator, to be disposed of by him in the same manner as the goods and chattels coming to his possession. There are numerous cases where valuable farms and other property are held under contract of purchase. The decedent and his family may have lived upon the property for years; the

purchase price may have been mostly paid; and it would be so unusual and unjust to allow the administrator to claim title to this property, and a right to dispose of it as personalty coming to his hands, without a showing that it was necessary in the settlement of the estate, that a statute authorizing such a procedure should be the only authority of this court to declare it to be the law."

"An equitable right to have a conveyance of land in fee, an equity of redemption, goes to the heir as land held in fee, though the statute of descents may only speak of land of which the decedent died seized." 1 Dembitz, Land Titles, sec. 28.

The heirs of a vendee in possession under a contract of sale of real estate are not possessed of "an estate of inheritance" at common law, hence, as we have seen, the widow of the deceased is not legally entitled to be endowed thereof. The right of their ancestor is merely in equity and though liable to be defeated by nonperformance of the contract on his part and consequent forfeiture, if the terms of the contract so provide, still it is in equity considered as real estate and, on his death, descends to his heirs.

In what position then do the defendants stand? Upon the death of Martin B. Cutler, the equitable interest in the lands of which he was possessed under the contract of purchase descended to his sons.

Gertrude Cutler, by the assent of the heirs, procured the 200 acres of land in controversy to be set apart to her as her dower, all parties treating the equitable estate as a legal one of which Cutler died seized. She entered into possession and paid out upon the contract, under the rights given thereby to Martin B. Cutler. While she took the title to the land in her own name, she could not assert it as against the true owners, it inured to their benefit and, though nominally the holder in fee, in equity, she held the legal title only as a trustee for them, and they were entitled to have their title quieted as against her devisees.

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Barker v. Wheeler.

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The judgment of the district court quieting the title in the heirs is correct and should be affirmed.

DUFFIE and KIRKPATRICK, CC., concur.

By the Court: For the reasons state in the foregoing opinion, the judgment of the district court is

AFFIRMED.

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GEORGE E. BARKER ET AL V. BERT G. WHEELER.

FILED APRIL 21, 1904. No. 13,538.

1. **Official Bond: SURETIES: ACTION.** Under the provisions of sections 29 and 643 of the code, when an officer in this state by misconduct or neglect of duties renders his sureties liable on his official bond, any person who is by law entitled to the benefit of the security may sue upon the bond in his own name.
2. **Statutes: CONSTRUCTION.** The sections of statutes which require the giving of official bonds, which prescribe the form of the same as to being joint or several, which state the conditions thereof and designate the persons for whose use they are given, and statutes which provide the manner of procedure in actions upon such bonds, and in whose names such actions are to be brought, are in *pari materia* and must be construed together.
3. **Official Bonds: JOINT AND SEVERAL: ACTION.** Since the form of an official bond must be joint and several, a person injured by the misconduct of a public officer may bring a several action upon the officer's bond to recover his damages.

ERROR to the district court for Douglas county: IRVING F. BAXTER, JUDGE. *Affirmed.*

*E. J. Cornish*, for plaintiffs in error.

*Isaac Adams and J. P. Breen*, contra.

LETTON, C.

This case has already been before this court three times. See *Wheeler v. Barker*, 51 Neb. 846; *Barker v. Wheeler*, 60 Neb. 470, and *Barker v. Wheeler*, 62 Neb. 150. After it was remanded to the district court for the third time,

a fifth amended petition was filed by the plaintiff, and the defendants moved to strike this petition from the files, for the reason that the allegations of the same constitute a different cause of action from those contained in the original petition; that James W. Eller, the principal upon the bond, was made a party to the action in the original petition, whereas, the said Eller is not named as a party in this petition; and that in the original petition it was alleged that the money in controversy came into the hands of Eller as county judge, by virtue of his office, whereas in this petition it is alleged that the money was received by color of his office. This motion was overruled, whereupon the defendants filed a demurrer, for the reason that there is a defect of parties defendant, in this, that it appears that this is an action upon the official bond of one Eller, county judge, the liability of these defendants being simply as sureties thereon. That, at the beginning of the action, Eller was made a party herein, pleading was filed by him, and trial had in part, and that Eller is a necessary party defendant. Defendants further demur on the ground that the facts stated are not sufficient to constitute a cause of action. This demurrer was overruled by the court; defendants elected to stand thereon, and judgment was thereupon rendered in favor of the plaintiff upon the pleadings. This is an error proceeding brought to review the action of the district court. After this action was dismissed as against Eller, a separate suit was brought against him to recover upon the same cause of action, and a judgment rendered therein. This judgment is pleaded in the fifth amended petition.

The main question is, can a party injured by the misconduct of a public officer bring a several action against the sureties on the official bond of such officer? The argument of the plaintiffs in error is substantially as follows: That at common law an action upon a bond could only be brought by the obligee therein. That the right to bring an action by a private person in his own name upon a bond, the obligee of which is the state or county, is granted

solely by the provisions of section 643 of the code. That this section provides solely for a joint action against the principal and sureties; that the action must be prosecuted against all of the obligors, and that, since Eller the principal is not made a party in the petition under consideration, there is a defect of parties defendant which may be taken advantage of by demurrer. This contention of the plaintiffs in error is to some extent supported by the decision in the case of *Aucker v. Adams & Ford*, 23 Ohio St. 543, which holds that section 566 of the code of Ohio, of which section 643 of our code is a copy, prescribes the only manner in which persons injured by the official neglect or misconduct of a justice of the peace can have redress by action in their own names on the official bond of the justice. That the only form of action authorized by said section is a joint suit against all the obligors in the bond, and that, where a joint suit is the only remedy, it is error under the provisions of section 371 of the Ohio code, which is the same as section 429 of the Nebraska code, for the court to render a several judgment against one or more of the defendants, leaving the action to proceed against the others. He also cites *Albertson v. State*, 9 Neb. 429, and *Ryan v. State Bank*, 10 Neb. 524. *Albertson v. State* was an action brought against the county treasurer upon his official bond by the state of Nebraska, to recover a balance due the state upon taxes. The court held that the provisions of sections 29, 32 and 643 of the code cover two classes of cases, the one where the security is taken to protect the right of the public, and the other where it is taken to protect the rights of individuals—section 643 applying to private persons and section 32 to actions by the public. In *Ryan v. State Bank*, the Ohio case is cited, and it is said: "On the trial of a joint action against the principal and sureties on an official bond, the judgment may be against any number of the defendants, as the testimony warrants. But several actions on such bond can not be maintained." The case of *Aucker v. Adams & Ford*, *supra*, was decided by the supreme court of Ohio



in 1873; *Albertson v. State* was decided in 1879, and *Ryan v. State Bank* was decided in 1880.

At the time these actions were brought, the statute of this state required joint bonds to be executed by public officers, and joint action brought upon the bonds could, therefore, alone be maintained. In 1881, however, the legislature of this state enacted an entirely new act with reference to the subject of official bonds, section 3, chapter 10 of which is as follows:

"All official bonds of county \* \* \* officers must be in form, joint and several, and made payable to the county in which the officer giving the same shall be elected or appointed, in such penalty and with such conditions as required by this act, or the law creating or regulating the duties of the office."

The plaintiff in error contends that, since this act did not expressly repeal or amend section 643 of the code, the provisions of that section are still in effect, and that, while the form of the bond is required to be joint and several, yet, since no additional rights have been given to private persons to sue upon an official bond in their own name than those prescribed by section 643, no action can be maintained other than a joint action against all the obligors to the bond.

The sections of the code cited by the plaintiff in error are substantially the same as those contained in the first Ohio code adopted in 1853. Before the enactment of this code, an action upon a bond under the common law could only be brought by the obligee. The object of these provisions was in accord with the general line and purpose of the reformed procedure, which was to simplify and modify the technicalities of the common law procedure and furnish a more simple and speedy remedy to litigants. The provisions, that all actions should be brought by the real party in interest and that any person injured by neglect of duty of an officer might bring an action in his own name upon the bond, were intended to supersede the necessity of suing upon the bond in the name of the

obligee. As is held in *Aucker v. Adams & Ford, supra*, these provisions, while allowing a suit to be brought by a private person in his own name upon an official bond, did not change the character of the contract entered into by the sureties from a joint contract to a several contract, and, consequently, a joint action had to be brought upon the joint bond.

Are the provisions of section 643 exclusive? Mr. Kinkead in his work on Code Pleading (vol. 1, sec. 346), speaking of the Ohio code, says, "The correct construction to be placed upon section 4,993 of the code is believed to be that, in all cases where an individual has suffered an injury by the failure of an official to perform official duty, he may maintain an action upon the bond of such official." Section 4,993 of the Ohio code contains the provision that actions must be prosecuted in the name of the real parties in interest. And in 1 Bates, Pleadings, Parties and Forms Under the Code, p. 7, it is stated, that the Ohio reports are full of cases brought by individuals upon official bonds of public officers. This court has also held that one not a party to a bond may maintain an action thereon, when such bond was executed for his benefit. *Pickle Marble & Granite Co. v. McClay*, 54 Neb. 661; *Sample & Son v. Hale*, 34 Neb. 220; *Lyman v. City of Lincoln*, 38 Neb. 794; *Kaufmann v. Cooper*, 46 Neb. 644; *Doll v. Crume*, 41 Neb. 655; *Hickman v. Layne*, 47 Neb. 177; *Fitzgerald v. McClay*, 47 Neb. 816; *Rohman v. Gaiser*, 53 Neb. 474. In 17 Am. & Eng. Ency. Law (1st ed.), 527, note 2, it is said: "Under the general code provisions, the obligee in a bond can sue for all liabilities thereunder, while each person to be secured thereby may sue in his own name as the real party in interest for any liability to himself." Citing cases from Kansas, Kentucky, Louisiana and New York. See also Pomeroy, Code Remedies (4th ed.), secs. 77, 79, 104. It would seem that a liberal construction of the broad terms of section 29 of the code, providing that all actions shall be brought in the name of the real party in interest, with a few exceptions, would hold that these provisions are not

limited and confined by the provisions of section 643, and that, independent of the provisions of said section, a person belonging to the class for whose benefit an official bond is given, and who has been injured by the negligence or misconduct of the principal upon the bond, has a right to sue upon the same in his own name as being the real party in interest.

Aside from these considerations, however, under the principle of statutory construction, that statutes in *pari materia* are to be construed together, all acts of the legislature upon the same general subject matter must be construed as part of a single plan, and later statutes are to be considered as supplementary or complementary to the earlier enactments. In the passage of each act, the legislature must be supposed to have had in mind the existing legislation on the same subject and to have shaped its new enactment with reference thereto. Black, Interpretation of Laws, sec. 86. The sections of statutes which require the giving of official bonds, which prescribe the form of the same as to being joint or several, which state the conditions thereof and designate the persons for whose use they are given, and statutes which provide the manner of procedure in actions upon such bonds and in whose names such actions are to be brought are in *pari materia* and must be construed together. This being the case, a reasonable construction of the code provisions, including section 643, together with the provisions of the statute of 1881, would require that the provision requiring the form of the bond to be joint and several in the latter statute modifies the provision of section 643, so that the law in regard to the right of an individual to bring this action in his own name, while not expressly amended or repealed, is still left in force, and the action may be brought against the officer and his sureties, jointly or severally. To give the law the effect contended for by the plaintiffs in error would, in effect, undo all the legislature did when it provided that official bonds should be joint and several in form, since, if every action brought upon such a bond by

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an individual must be a joint action, the object of the law would be rendered nugatory, and it might as well never have been enacted. With this interpretation of the statutes we can not agree.

As ground for the demurrer that the petition does not state facts sufficient to constitute a cause of action, and for the error assigned in overruling the motion to strike the fifth amended petition, the plaintiffs in error claim that the last petition alleges facts which show that the county judge received the money by color of his office and not by virtue of his office. In both petitions it is charged that, upon the final examination of the accounts of the administrator of the estate of B. G. Wheeler, deceased, it was ordered that said administrator pay into the county court on account of said estate the sum of \$3,934.94, for distribution to the heirs of said estate, and that said sum was paid into said court for that purpose. The first petition alleges that the sum of \$484.42 was paid by Eller, as county judge, to the plaintiff's guardian, and that Eller has neglected and failed to pay the remainder of the amount due her to her guardian, although requested so to do, while the fifth amended petition recites the same facts with reference to the payment of \$484.42 to the guardian, and charges that said Eller by virtue and color of his said office, after having obtained possession of said money, as aforesaid, wrongfully, fraudulently and corruptly, and in gross violation of his duties as such county judge, converted said sum to his own use, and embezzled the same, and has retained all of said sum, notwithstanding payment thereof has been frequently demanded from him by plaintiff and plaintiff's guardian. While the allegations of the last petition are broader, fuller and more extended than those of the first, we can not see that there is a variance between them, or that the allegations of one recite acts done *virtute officii* and the other acts done *colore officii*.

As to the error assigned, that the amount of recovery is excessive, the demurrer admits the allegations of the pe-

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tition that Eller, on the 29th day of March, 1902, obtained possession of the money, that he converted the same to his own use, and that, ever since the date of its payment, he has retained the same, notwithstanding payment has been frequently demanded from him by the plaintiff and the plaintiff's guardian. Under these admissions it would seem that interest was properly computed.

We recommend that the judgment of the district court be affirmed.

DUFFIE and KIRKPATRICK, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is

AFFIRMED.

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JOHN J. BOTHWELL V. STATE OF NEBRASKA.

FILED MAY 5, 1904. No. 12,656.

1. **Rape: RESPONSIBILITY FOR CRIME.** The generally accepted test of responsibility for crime, is the capacity to understand the nature of the act alleged to be criminal, and the ability to distinguish between right and wrong with respect to such act. *Schwartz v. State*, 65 Neb. 196.
2. **Defense of Moral Insanity.** Moral insanity as a criminal defense is not recognized in this state. One who knows abstractly what is right and what is wrong must, at his peril, choose the right and shun the wrong. He can not yield to a vicious impulse, and allege mere weakness of will as an excuse. *Schwartz v. State*, 65 Neb. 196.
3. ———: **INSTRUCTION.** An instruction on the question of insanity, in principle substantially the same as one given in *Burgo v. State*, 26 Neb. 639, and approved, *held* not erroneous.
4. **Reasonable Doubt: INSTRUCTION.** Instruction concerning what is a reasonable doubt, *held* not prejudicially erroneous, following *Leisenberg v. State*, 60 Neb. 628.
5. **Nonexpert Witnesses.** Nonexpert witnesses can be permitted to express opinions as to the sanity or insanity of a person only when they have shown other sufficient qualifications, and have stated the facts and circumstances upon which their opinion of mental condition is based. *Lamb v. Lynch*, 56 Neb. 135.

**ERROR to the district court from Cherry county: WILLIAM H. WESTOVER, JUDGE. *Reversed.***

*E. D. Clark and Hamer & Hamer, for plaintiff in error.*

*Frank N. Prout, Attorney General, and Norris Brown. contra.*

**HOLCOMB, C. J.**

An information was filed in the trial court, charging the accused with the crime of rape upon his daughter. A plea of not guilty was interposed. Upon this plea, at the trial, it developed that the defense of insanity was relied on by the defendant to escape legal responsibility for the act charged. Upon a trial to the court and a jury of the issue raised by the plea of not guilty, a verdict was returned finding the defendant guilty as charged and, after the overruling of a motion for a new trial, sentence of imprisonment in the penitentiary during the natural life of the defendant was pronounced by the court. The defendant prosecutes error. To establish his defense, testimony as to the defendant's mental condition was introduced, both of an expert and nonexpert character. It is alleged in the petition in error that the verdict is not sustained by the evidence, the contention being that the evidence indisputably establishes the defense of insanity. It is conceded, however, by counsel for defendant that, in order for the court to reach this conclusion, it must establish a new rule as to the test of legal responsibility when insanity is interposed as a defense for an act otherwise criminal. The substance of the contention of counsel is that the defendant's mind was not at the time of the act charged perfectly sound and normal; that he was physically impaired by disease, and that his mental condition was the result of such physical impairment; that he was both a mental and physical wreck, and unable to control his action, and therefore not legally responsible for the act of which he was charged. Counsel say: "We desire

to have this court formulate a rule that shall secure the punishment of those who are strong enough to determine that which is right and that which is wrong, and who are able to choose between the two, but that no one should be punished who is so far mentally impaired as to be unable to choose between right and wrong." It is argued that the evidence discloses that the defendant was born with a taint of insanity within his veins, and that he was insane by heredity; that he was subject to severe attacks of headache and was nearly always melancholy; that he gave way to the most violent fits of anger without provocation, was brutal to his mother and his children, and unnaturally cruel; that he had tremors and hallucinations, and would give way to paroxysms of grief over the violences and viciousness which he could not help. A specialist on brain disease, one of the superintendents of an insane asylum of the state, who testified in the case, denominated the defendant a "degenerate." Says the witness, by the use of that term is meant that the defendant is not up to the standard of normal mankind, referring especially to his intellectual, moral and physical forces; that such an individual would be subject to, and the victim of, a violent temper, uncontrollable appetites and impulses which his will power could not control, and that the absence of such ability to control his impulses and desires, owing to the fact that they were stronger than his will, though his reason and his judgment might not be at fault, would constitute technical insanity. It is further said that such a person would not have a normal conception of what constituted right and wrong as to himself, nor to his family, nor to society. Testimony of other physicians of a similar character was also introduced in evidence, as was also the testimony of nonexpert witnesses who, after detailing the actions and conduct of the defendant, expressed it as their opinion that he was insane. To meet evidence of this character, the state introduced several witnesses who, after showing some familiarity with the defendant, were permitted to testify that, in their judgment, he was sane.

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After the introduction of the evidence, the defendant's counsel requested the following instruction as embodying a correct principle of law, which was refused: "If the defendant acted under an irresistible impulse which his will was powerless to resist, and which overcame his will, and which impulse was the outgrowth or result of physical infirmity or disease, you will acquit." From what has been said, it is obvious that, in respect of the nature of the defense, this case is in all its essential bearings analogous to, and controlled by, the principles announced in the case of *Schwartz v. State*, 65 Neb. 196. It is there said:

"Capacity to comprehend the nature and moral quality of an act determines criminal responsibility. There is no other safe or practical test. It is entirely certain that the defendant in this case did not have a well balanced mind. He had an inherited tendency to insanity, and had in past years received treatment in a hospital for the insane. It seems, too, that he had at times illusions and delusions, but these were not in any way connected with the crime in question. He had groundless fears, and heard voices in the air, but it was not in consequence of these things that he debauched his daughter. It may be conceded that his mental powers were impaired, and his conscience blunted by disease, but that does not render him legally irresponsible. If he understood what he was doing, and knew it was wrong and deserved punishment, the obligation to control his conduct and keep within the law was absolute. Having this degree of mental capacity, he can not allege the sway of a turbulent passion as an excuse for his crime. The doctrine of moral insanity or uncontrollable impulse, upon which counsel seem mainly to rely, is not recognized in the jurisprudence of this state." We are not disposed to depart from the rule as to the test of legal responsibility thus announced, which has the support of an unbroken line of decisions in this state, beginning with the case of *Wright v. People*, 4 Neb. 407. While the brief of counsel for the defendant is interesting in its discussion of the



varied forms, manifestations and stages of mental diseases, and pleads for an idealistic state in the treatment of those who may not be possessed of the strong, healthy and vigorous minds possessed by the average of humanity, nevertheless, in this practical age and as society is at present constituted, we are of the opinion greater evils will flow from a departure, than in continuing to travel along the well-beaten paths which guide and determine legal responsibility for violations of the law. The objection that the verdict is not sustained by sufficient evidence is not well taken.

It is contended the court erred in giving an instruction on the question of insanity, but as this instruction is substantially the same and, in principle, identical with one given in *Burgo v. State*, 26 Neb. 639, and approved by this court, we are constrained, on the authority of that case, to hold that the exception in the present instance is not well taken.

An instruction concerning what is a reasonable doubt, such as would call for an acquittal, is strenuously excepted to, and much of the brief is devoted to an analysis of, and animadversions upon, the same. This instruction, as is expressed in *Leisenberg v. State*, 60 Neb. 628, although frequently used, has never received judicial condemnation and we do not now feel that we are justified in condemning it, and therefore must overrule the exception to the giving of the same.

A more serious objection arises regarding the admission of certain evidence offered by the state, in rebuttal, to overcome the evidence of the defense on the question of insanity. Several nonexpert witnesses were permitted to testify that, in their opinion, the defendant was sane at the time of the commission of the act charged. No physicians were called by the state to give testimony concerning the defendant's mental condition. The nonexpert witnesses were permitted to testify as to their opinion of the mental condition of the defendant, without first testifying to the appearance, conduct and actions of the accused, and

other facts upon which their opinions were based. These several witnesses were shown to have a more or less intimate acquaintance with the defendant, such as would probably qualify them to testify to reputation, but the jury were denied the benefit of any testimony as to his speech, actions or conduct, from which the inference of sanity was drawn, and were given only the naked opinions of the witnesses concerning the question. The rule in this jurisdiction is that, while one who is not an expert may give his opinion on the question of sanity, yet, it must be in connection with and after detailing the facts upon which he bases such opinion, so that the jury may have, not only the benefit of the opinion of the nonexpert, but also the facts upon which such inference is predicated. In *Lamb v. Lynch*, 56 Neb. 135, it is held:

“Nonexpert witnesses can be permitted to express opinions as to the sanity or insanity of a person only when they have shown other sufficient qualifications, and have stated the facts and circumstances upon which their opinion of mental condition is based.”

This rule is adverted to and the reasons for its existence discussed in *Hay v. Miller*, 48 Neb. 156, and *Hoover v. State*, 48 Neb. 184. Touching this subject, it is said by the supreme court of the United States: “The jury, being informed as to the witness’ opportunities to know all the circumstances, and of the reasons upon which he rests his statement as to the ultimate general fact of sanity or insanity, are able to test the accuracy or soundness of the opinion expressed, and thus, by using the ordinary means for the ascertainment of truth, reach the ends of substantial justice.” *Connecticut Mutual Life Ins. Co. v. Lathrop*, 111 U. S. 612, 621. To the same effect are *Schlenger v. State*, 9 Neb. 241; *Polin v. State*, 14 Neb. 540; *Shults v. State*, 37 Neb. 481; *Pfueger v. State*, 46 Neb. 493; *Snider v. State*, 56 Neb. 309; *Clarke v. Irwin*, 63 Neb. 539. See also McKelvey, Evidence, p. 197, notes 51 and 52; *Armstrong v. State*, 30 Fla. 170, 17 L. R. A. 484; *Ryder v. State*, 100 Ga. 528, 38 L. R. A. 721, and notes; *Burt v.*

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*State*, 38 Tex. Cr. App. 397, 39 L. R. A. 305; *In re Christiansen*, 17 Utah, 412, 41 L. R. A. 504. As to the admissibility of the evidence of the character referred to, it is said by the state that, if it be held the prosecution failed sufficiently to qualify the witnesses, the reception of their testimony was without prejudice because the defendant had wholly failed to introduce any evidence to sustain the plea of insanity. The defense, it is said, has shown an abnormal mind and moral degeneracy, but not insanity. We find ourselves unable to adopt the suggestion. There was some competent evidence both of expert and nonexpert witnesses tending to prove the defense of insanity. The question was one of fact peculiarly within the province of the jury to determine. If was for them, upon the whole of the evidence properly admissible, to say, whether the defendant was guilty or not guilty. It was his constitutional right to have this question determined by the jury upon competent evidence. Whether the evidence in support of the plea of insanity introduced by the defendant, when standing alone, was sufficient to create in their minds a reasonable doubt of the defendant's guilt, was for the jury and not the court to determine. We are not prepared to say that no competent evidence tending to prove insanity was introduced, nor that guilt was indubitably established. Whatever might be our own views, with some competent evidence before the jury in support of the plea of insanity, we are constrained to say that it is for them to say whether guilt in a legal sense is shown by the evidence. When the state undertook to overcome the proof offered to sustain the defense of insanity by other evidence, inadmissible in the form in which it was presented and which was received over objections, this constitutes prejudicial error for which the judgment must be reversed and the cause remanded for further proceedings. Reversed and remanded accordingly.

REVERSED.

## ROBERT S. TRUMBULL V. SCOTT FREY.

FILED MAY 5, 1904. No. 13,267.

**Verdict:** EVIDENCE. Evidence examined, and found sufficient to sustain the verdict of the jury.

ERROR to the district court for Kearney county: ED L. ADAMS, JUDGE. *Affirmed.*

*Lewis C. Paulson*, for plaintiff in error.

*J. L. McPheeley*, *contra.*

HOLCOMB, C. J.

The defendant in error had been in the employment of the plaintiff in error as a farm hand and, upon his discharge from such employment, brought an action and recovered judgment on the ground that his contract of employment had been violated, in that he had been discharged before the expiration of the term for which employed and without any just cause therefor. Counsel for plaintiff in error says that the contract of hire is based on a written contract, and that the defendant was, under the evidence, justified in discharging the plaintiff when he did because there had been a failure of crops which, under the contract, was a ground for its termination; that the contract of employment was for an indefinite period, and also the discharge was justified because the plaintiff was not a competent farm hand. "We think," says counsel for plaintiff in error, "the only proposition involved in this case is whether or not the circumstances and the evidence in the case justified the discharge of the defendant in error." The controversy thus resolves itself into a question of whether the evidence is sufficient to sustain the verdict. The contract of employment is evidenced by a written correspondence between the parties. The plaintiff was at the time living in Illinois. He was a man of a family and was induced, by reason of the contract, to move to Kearney

county, on a farm belonging to the defendant, to do the ordinary work of a farm hand. In the first letter of the defendant to the plaintiff, of date November 17, 1900, after stating the details regarding the proposed employment, and that work was to commence April the first next, it is said: "If you think you want to try it one year, I will give you first chance, as I have no one hired yet." In a second letter of later date, in answer to one from the plaintiff, defendant says: "I will pay a good man \$25 per month and, unless there is a failure of crops, I will want him steady all the time." While not altogether clear, we think a fair construction of the letters referred to, in view of the situation of the parties, means that the employment was to continue for one year, and the plaintiff's services would be wanted steadily for a longer time, unless there was a failure of crops. But, if it be held that the true interpretation is that the condition applied to the first year of the employment, it can hardly be said that the evidence is so overpowering on the point of the failure of crops in that year as to allow the defendant, at his pleasure, to terminate the contract. The evidence does not disclose a total but only a partial failure of crops. The trial court took the view, and so instructed the jury, that it was for them to determine, as a question of fact, whether there was, under the evidence, such a failure of crops as was within the contemplation of the parties to the contract.

There is yet another consideration which we think must dispose of the defendant's contention in this regard. The answer does not plead the happening of the condition relative to crop failure, whatever view may be taken as to the proper construction of the contract in this respect. All that is alleged is: "Defendant met to a great extent with failure of crops during said year." This does not amount to an allegation that there was such a failure as gave him a right to terminate the contract, nor does he allege that it was terminated on that account. On the contrary, it appears that the employment of the plaintiff was continued till after all of the fall work on the farm was done,

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and long after the crop production became known, when he was then discharged for other alleged reasons. On the question of his incompetency and failure to do satisfactory farm work, the evidence is conflicting, and we are satisfied it is sufficient to support the finding of the jury on that issue. Upon a consideration of the whole record, we are constrained to say that the evidence supports the verdict, and that the judgment rendered does substantial justice between the parties and should be affirmed, which is accordingly done.

**AFFIRMED.**

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**JOHN EMANUEL V. EDWIN H. BARNARD ET AL.**

**FILED MAY 5, 1904. No. 12,757.**

1. **Insolvent Corporation: ATTACHMENTS: LIABILITY OF DIRECTORS.** Where, by an attachment proceedings, without any fraud or irregularity, certain *bona fide* creditors of an insolvent corporation secure the application of all of the corporate assets to the payment of their claims, the fact that the directors of the corporation who had guaranteed the payment of such claims requested, and thus induced, the creditors to institute the attachment suits, without giving the said creditors any advantage or rights, other than those which as a matter of law they already possessed, does not make such directors liable in an action at law to the other creditors of the corporation.
2. **Action in Tort.** One is not liable in tort for procuring or inducing others to pursue a clear legal right, although such action may result to his advantage.
3. **Action at Law: PETITION: PRAYER.** In an action at law, a prayer for equitable relief is of no avail, unless the petition states facts which will authorize the court to grant such relief.
4. —: **CREDITORS' BILL.** A single creditor can not maintain an action at law against a part of the stockholders of an insolvent corporation for a violation of the provisions of section 136, chapter 16 of the Compiled Statutes. Such action should be brought in equity, by the receiver if there be one, or by a creditor on his own behalf, and for all the other creditors similarly situated, against all of the stockholders of the corporation.
5. **Judgment: REVERSAL.** A plaintiff in error is not entitled to have a judgment of the district court reversed because the rights of a

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part of the defendants are not adjudicated, when no right of recovery exists in his favor against any of them.

6. **Misjoinder:** REVIEW. In such a case, the question as to whether there was a misjoinder of causes of action, or of parties, does not affect the plaintiff, when he is the only party complaining.

ERROR to the district court for Dodge county: JAMES A. GRIMISON, JUDGE. *Affirmed.*

*George L. Loomis*, for plaintiff in error.

*Courtright & Sidner, E. F. Gray and Stinson & Martin*,  
*contra.*

BARNES, J.

This was an action at law brought by the plaintiff, an individual creditor of an insolvent corporation, in the district court for Dodge county, against the defendants who were respectively the president, secretary and general manager, as well as directors and a part of the stockholders of the corporation. The plaintiff was the owner of two judgments against the association, upon which executions had been issued and returned unsatisfied, and these judgments are the basis of the action which was brought against the defendants jointly. After the issues were joined and the cause had been pending for some considerable time, a stipulation was entered into by the parties, on which, together with the pleadings, the cause was submitted to the court. Thereupon the defendants, Barnard and Hinman, moved for a judgment in their favor on the pleadings and stipulation. The attorney for defendant Huette refused to join or participate in the motion. After the argument and submission of the case, the defendant Hinman was granted leave to, and did, withdraw the motion on his part. The court thereupon sustained the motion of defendant Barnard, and rendered a judgment in his favor dismissing the plaintiff's cause of action. A motion for a new trial was filed and overruled, and thereupon the plaintiff prosecuted error.

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Two distinct theories are advanced in support of the plaintiff's right to recover. The first one is based on the following facts: It appears that, on the 28th day of July, 1896; the corporation was justly indebted to two creditors, Hall and Chase, on certain promissory notes, then past due, which it was unable to pay by reason of its insolvency. The defendants Barnard and Hinman had guaranteed the payment of these notes, and it is alleged that the defendant Huette had agreed to share their responsibility. It is alleged in the petition:

"The defendants fraudulently and wrongfully procured the said Hall and the said Chase to commence suits on said notes, so made to and held by them, in the district court for Dodge county, Nebraska, and to attach, in said suits, all the property and assets of every kind belonging to said corporation, and to have all of said property and assets sold under said attachment, and the proceeds thereof entirely applied toward the payment of said three several notes, themselves agreeing to and paying all the costs and expenses of said proceedings; and all of the property and assets of the said corporation were sold by the sheriff of said county, upon orders of sale issued in said attachment suits, on the first day of February, 1897, and on the 16th day of February, 1897, for the sum total of \$6,259.50, and the proceeds of said sales were applied to the payment of said notes for \$3,000 and \$2,000 to said Hall, and the part payment of said note for \$5,000 to said Chase."

It was admitted by the defendants that the debts due the attaching creditors existed and were guaranteed; that the attachment proceedings were had, the property sold and the proceeds applied as stated; but the allegation that the defendants procured the attachment proceedings to be commenced was denied; and the defendant Huette denied any liability for the debts. The contention of the plaintiff is that, because the defendants were officers of the corporation and were liable for the debts which were the foundation of the attachment proceedings, and because the entire property of the corporation was, by



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sale under such proceedings, applied to the debts for which the defendants were so liable, by procuring the attachments to be sued out, they misappropriated the property of the corporation and rendered themselves liable to him in an action at law for the entire amount of his claim.

This action can not be maintained as one for the misappropriation of the funds of the corporation, because every dollar of such funds went to pay its just debts, and no stockholder or party directly interested in the corporation has cause to complain. The defendants did not convert any of the corporate property to their own use; there is no pretense that the attachments were not regularly issued, or that the debts upon which the property was applied were not genuine; nor is it contended that the attaching creditors were wrongdoers in any sense, or that they did anything they had not a legal right to do. It is true that they exercised their unquestioned legal right in a manner that relieved the defendants of a portion of their liability for the debts of the corporation; but the mere fact that the defendants requested, and thus induced, the creditors to take this course does not render them liable to the plaintiff, even in a suit in equity. There is no property or assets of the corporation in their hands which the plaintiff can reach, and they have received no payment upon any debts owed to them, as the result of their action as officers of the corporation. If the plaintiff has any cause of action against the defendants, it is an action at law sounding in tort. The facts alleged are not sufficient to give the plaintiff the right to maintain such an action, the petition does not charge the defendants with conspiracy with the attaching creditors; and such creditors are not parties to this suit. It has been well said that there can be no conspiracy to do that which is lawful, in a lawful manner. *Porter v. Mack & Boren*, 50 W. Va. 581, 40 S. E. 549. It is lawful for a diligent creditor to secure the payment of his debt from an insolvent corporation, and there is no pretense in this case

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that such act was done in an unlawful way. Unless an act is wrongful in the sense of being unlawful, it will not sustain an action for damages. In the case at bar, the action of the defendants conferred no new right on the attaching creditors, and gave them no advantage over the other creditors which they did not already possess. No liability is created against one for procuring a third person to do an act which may lawfully be done. In 1 Cooley, Torts (3d ed.), sec. 93, it is said: "That which is right and lawful for one man to do can not furnish the foundation for an action in favor of another." We are of the opinion that one is not liable in an action for damages because he procures another to do that which is neither legally nor morally wrong. That the defendants paid the costs of the attachment proceedings is no cause for complaint on the part of the plaintiff. If it is true that they were guarantors of the debts due the creditors, which were the basis of the attachment proceedings, they were liable for the costs made in collecting these debts. Their guaranty upon the notes in question was an express agreement to pay all costs and expenses paid or incurred in collecting the same. None of the cases relied on by the plaintiff sustain his contention. A careful examination discloses that, in a part of them, the officers themselves had taken the assets to pay debts due them from the corporation, thus giving themselves a preference over the other creditors; and that, in the others, they had, by some action of their own, turned over the assets of the corporation for the payment of debts on which they themselves were liable. As before stated, the defendants in this case had taken no action by which any property of the insolvent corporation was misapplied. We fail to find a single case supporting the plaintiff's first theory; and we hold that the judgment of the district court was correct on this point.

The plaintiff's second contention is that the defendants were liable as stockholders for the failure of the corporation to give the notice required by section 136, chapter

16 of the Compiled Statutes (Annotated Statutes, 4128). The pleadings and stipulated facts show that the notice was published, but was insufficient in this, that it was not signed by a majority of the board of directors. And it is contended that the plaintiff can maintain this action for his sole benefit, and in this form against the defendants, without joining all of the stockholders of the insolvent corporation. On the other hand, the defendants contend that plaintiff must bring his suit in equity, for himself and all other creditors similarly situated, against all of the stockholders; and, having failed to do so, the district court was right in dismissing the action. It must be conceded that we are firmly committed to the doctrine that the double liability of stockholders in banking corporations, and other corporate bodies, and the liability of the stockholders in such corporations for unpaid subscriptions can only be enforced after the assets of the corporation are wholly exhausted, and, then, at the suit of a receiver for all of the creditors, or a single creditor, in behalf of himself and all others similarly situated, against all of the stockholders of such corporation. *Van Pelt v. Gardner*, 54 Neb. 701; *Pickering v. Hastings*, 56 Neb. 201; *Farmers Loan & Trust Co. v. Funk*, 49 Neb. 353; *State v. German Savings Bank*, 50 Neb. 734; *Hastings v. Barnd*, 55 Neb. 93; *Brown v. Brink*, 57 Neb. 606; *Fremont Package Mfg. Co. v. Storey*, 2 Neb. (Unof.) 325. In the case last above cited it was said:

"Under the rule established in this state, this action must be brought against all the delinquent stock subscribers, and if all are not made parties defendant, a good and sufficient reason should be set forth in the petition for not doing so to warrant a recovery against any. The rule established in this state is supported by strong authority in the decisions of other states; and, commenting upon this rule, the supreme court of Michigan, in *Dunston v. Hoptonic Co.*, 83 Mich. 384, 47 N. W. 322, say: 'This seems to be the rule as established by the great weight of authority, and I think it is the just, reasonable and

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equitable one. Any other rule would permit the creditors of the corporation to select one or only a few of the stockholders within the jurisdiction, and compel payment by them of all the debts of the corporation, at least up to the unpaid balance of their subscription, and such subscribing stockholders, in order to compel the others to contribute, would be remitted again to the courts, thus leading to a multiplicity of suits.'” It is contended, however, that there is a distinction between such liability of the stockholders and the one sought to be enforced in this action. It is insisted that the liability here in question is penal in its nature, and therefore the action can be maintained. This contention, pursued to its ultimate conclusion, means that, where there has been a failure to comply with the terms of section 136, by publishing the notice in the exact manner and form as provided therein, any one of the stockholders of the corporation may be sued, and a recovery had for the full amount of the debt due by the corporation to any individual creditor, without regard to the rights of any other creditor, or the liability of any other stockholder. We can not accede to this proposition. The section in question reads as follows:

“Every corporation hereafter created shall give notice annually, in some newspaper printed in the county or counties in which the business is transacted, and in case there is no newspaper printed therein, then in the nearest paper in the state, of the amount of all the existing debts of the corporation, which notice shall be signed by the president and a majority of the directors; and if any corporation shall fail to do so, after the assets of the corporation are first exhausted, then all the stockholders of the corporation shall be jointly and severally liable for all the debts of the corporation then existing, and for all that shall be contracted before such notice is given, to the extent of the unpaid subscription of any stockholder to the capital stock of such corporation, and in addition thereto the amount of capital stock owned by such individuals.”

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It will be observed that, while the liability declared for such default seems to be *quasi* penal in its nature, yet, the amount of recovery depends upon the sum due from the stockholder on his contract as a subscriber to the capital stock of the corporation, with an additional liability, to the amount of the stock held by him. Again, section 139 provides:

"If any corporation fail to comply substantially with the provisions of this subdivision in relation to giving notice, and other requisites of organization, after the assets of the corporation are first exhausted, then the property of any stockholder shall be liable for the corporate debts to the extent of the unpaid subscription of any stockholder to the capital stock of such corporation, and in addition thereto, the amount of capital stock owned by such individual."

It thus appears that while, in a certain sense, that is to say, to the extent of creating an additional liability, the statute in question is penal (*Kleckner v. Turk*, 45 Neb. 176; *Globe Publishing Co. v. State Bank of Nebraska*, 41 Neb. 175), yet, the right to recover anything at all thereunder depends upon the contractual relation of stockholder. Again, it is provided that no liability attaches, at all, under this statute until all of the corporate assets are exhausted, and we are aware of no case in which an action like the one at bar has been maintained. Section 4, article 11b of the constitution, provides:

"In all cases of claims against corporations and joint stock associations, the exact amount justly due shall be first ascertained, and after the corporate property shall have been exhausted, the original subscribers thereof shall be individually liable to the extent of their unpaid subscription, and the liability for the unpaid subscription shall follow the stock." We have held, in an unbroken line of cases, that notwithstanding this section of the constitution makes each stockholder individually liable to the extent of his unpaid subscription, yet, in order to enforce such liability, the amount of the claims must be first

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ascertained by the judgment of a court, and the corporate assets exhausted, by the issuance of an execution upon such judgment and the return of the same unsatisfied. In addition to this we have held that a suit in equity, based on this situation of affairs, must be brought, either by the receiver of the insolvent corporation or by a creditor, for himself and all other creditors similarly situated, against all of the stockholders of the corporation. Section 136, in express terms, provides that the stockholders are not made liable for the debts of the corporation by a failure to publish the required notice, until all of the corporate assets are first exhausted. Again, as before stated, the liability of each individual stockholder depends upon the amount of stock owned by him, and the amount due and unpaid on his contract of stock subscription. It follows that the reasons which impelled us to adopt the rule in the one case are equally potent in the other. If, as is claimed, this is a penal action, then the question of the amount of the defendant's stock subscription, and the amount of the stock owned by him, would cut no figure whatever. Such an action, if purely penal, could be maintained by any individual creditor of the corporation against any individual stockholder, for the full amount of the corporate debt due to him. That such was not the intention of the legislature seems quite clear to us. It is apparent that it was the purpose of that body to simply create an additional fund for the payment of a certain class of creditors, to be reached in the same manner, and by the same procedure, as the amount for which the stockholders were theretofore liable. In order to enforce this liability, it is necessary for the receiver of the insolvent corporation, if there be one, or a creditor, for himself and on behalf of all other creditors similarly situated, to bring an action in equity against all of the stockholders. The decree in such an action should find the amount due each creditor entitled to participate in the fund, together with the amount for which each individual stockholder is liable. Such a decree would be

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just and equitable, and would, at once, put an end to all further litigation.

We therefore hold that the plaintiffs' petition, so far as this question is concerned, did not state facts sufficient to constitute a cause of action. It is contended, however, that, while this was an action at law, yet, the petition contained a prayer for general equitable relief, and therefore the court erred in dismissing the action. In answer to this contention, it is sufficient to say that a prayer for equitable relief is of no avail, unless the petition contains an averment of facts upon which such relief may properly be granted.

It is next contended that the case was never submitted for judgment by the defendants Hinman and Huette. We think this question is immaterial. It was submitted for judgment by the defendant Barnard, and the facts which would entitle the plaintiff to recover against Barnard would also entitle him to recover against Hinman and Huette. If, however, as we have held, no recovery could be had against Barnard, then no judgment could be rendered against either of the other defendants.

Lastly, we may say that the question as to whether there was a misjoinder of causes or of parties in this case is of no importance to the plaintiff. He is the only party here complaining, and judgment was properly rendered against him.

For the foregoing reasons the judgment of the district court was right and is therefore

AFFIRMED.

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JAMES L. KENNEDY V. STATE OF NEBRASKA.

FILED MAY 5, 1904. No. 13,650.

1. Evidence. Evidence examined, and held sufficient to sustain the verdict.
2. Burglary: EVIDENCE. Where one is arrested for the crime of burglary, evidence of what was found in his room at the time

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of his arrest, together with his conduct and statements on that occasion, is proper and competent as tending to show his consciousness of innocence or guilt, as the case may be.

3. **Evidence of Attempts to Escape.** The attempts of the accused to escape, while confined in jail awaiting his trial, may be shown as an inculpatory circumstance properly to be considered by a jury, and to be given such weight as it seems fairly entitled to, with the other evidence introduced at the trial, in determining the question of his guilt or innocence.

ERROR to the district court for Colfax county: JAMES A. GRIMISON, JUDGE. *Affirmed.*

*James B. Kelkenney, W. I. Allen and E. D. Hodsdon* for plaintiff in error.

*Frank N. Prout, Attorney General, and Norris Brown.* *contra.*

BARNES, J.

In the night season of the 17th day of April, 1903, the store house of Peter Vetter, and bank building of Englebert F. Folda, situated in the village of Rogers in Colfax county, in this state, was broken into; the vault of the bank, in which the safe containing the bank's money was situated, was entered by tunneling a hole through the brick wall thereof; the safe was wrecked by explosives, and there was taken therefrom, and carried away, the sum of \$2,200 in lawful money of the United States, the property of the said Folda. On the first day of June, following, James L. Kennedy was arrested, in the city of Omaha, taken to Colfax county, and was there charged with the commission of the crime above described. His trial in the district court for that county resulted in a verdict of guilty, as charged in the information; and he was thereupon sentenced by the court to imprisonment in the state penitentiary for a period of seven years. From that judgment and sentence he prosecuted error to this court, and will hereafter be called the plaintiff.

His first contention is that the evidence is not sufficient



to sustain the verdict. And it is strenuously urged that no facts or circumstances were disclosed that in any manner connected him with the crime charged. After making ample proof of the commission of the crime, the state introduced evidence from which it appeared, beyond a reasonable doubt, that the plaintiff was seen in Rogers on the morning before the robbery occurred, standing in front of the bank and looking into the building from a point where he could see the location of the safe, through the open vault door. He was accompanied by a person described as Frank Sherwood. About six o'clock the next morning, plaintiff and Sherwood were seen by several persons coming into North Bend, a town on the Union Pacific railroad, seven miles east of Rogers. They were traveling on foot, entered the town from the west, went to the depot and boarded the first train which came along. It was also shown that these persons had been frequently seen together in North Bend and Rogers; that they had been hanging around Columbus, Fremont, Grand Island and Aurora for about two months next before the robbery took place; that once, at least, during that time, and just before the crime was committed, plaintiff had visited Omaha for a day or two. It was further shown that these parties were not engaged in any business whatever; that they frequented the saloons in those towns, and spent most of their time in drinking and playing cards; that the plaintiff, for a considerable time, had rented a room at a restaurant in North Bend, called "Maloney's Place." It further appeared that the plaintiff had no money before the robbery occurred, and that immediately thereafter he had plenty of it. It was shown that he had a wife in the city of Omaha with whom he corresponded, and occasionally visited; that they lived in a rented flat on North 16th street; that immediately after the robbery they sold their furniture, which cost them \$350, for the small sum of \$65, the plaintiff stating, as an excuse therefor, that his wife was ill and he desired to take her to Hot Springs, Arkansas; that, in giving the bill of sale for the furniture to the purchaser,

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Two distinct theories are advanced in support of the plaintiff's right to recover. The first one is based on the following facts: It appears that, on the 28th day of July, 1896; the corporation was justly indebted to two creditors, Hall and Chase, on certain promissory notes, then past due, which it was unable to pay by reason of its insolvency. The defendants Barnard and Hinman had guaranteed the payment of these notes, and it is alleged that the defendant Huette had agreed to share their responsibility. It is alleged in the petition:

"The defendants fraudulently and wrongfully procured the said Hall and the said Chase to commence suits on said notes, so made to and held by them, in the district court for Dodge county, Nebraska, and to attach, in said suits, all the property and assets of every kind belonging to said corporation, and to have all of said property and assets sold under said attachment, and the proceeds thereof entirely applied toward the payment of said three several notes, themselves agreeing to and paying all the costs and expenses of said proceedings; and all of the property and assets of the said corporation were sold by the sheriff of said county, upon orders of sale issued in said attachment suits, on the first day of February, 1897, and on the 16th day of February, 1897, for the sum total of \$6,259.50, and the proceeds of said sales were applied to the payment of said notes for \$3,000 and \$2,000 to said Hall, and the part payment of said note for \$5,000 to said Chase."

It was admitted by the defendants that the debts due the attaching creditors existed and were guaranteed; that the attachment proceedings were had, the property sold and the proceeds applied as stated; but the allegation that the defendants procured the attachment proceedings to be commenced was denied; and the defendant Huette denied any liability for the debts. The contention of the plaintiff is that, because the defendants were officers of the corporation and were liable for the debts which were the foundation of the attachment proceedings, and because the entire property of the corporation was, by

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sale under such proceedings, applied to the debts for which the defendants were so liable, by procuring the attachments to be sued out, they misappropriated the property of the corporation and rendered themselves liable to him in an action at law for the entire amount of his claim.

This action can not be maintained as one for the misappropriation of the funds of the corporation, because every dollar of such funds went to pay its just debts, and no stockholder or party directly interested in the corporation has cause to complain. The defendants did not convert any of the corporate property to their own use; there is no pretense that the attachments were not regularly issued, or that the debts upon which the property was applied were not genuine; nor is it contended that the attaching creditors were wrongdoers in any sense, or that they did anything they had not a legal right to do. It is true that they exercised their unquestioned legal right in a manner that relieved the defendants of a portion of their liability for the debts of the corporation; but the mere fact that the defendants requested, and thus induced, the creditors to take this course does not render them liable to the plaintiff, even in a suit in equity. There is no property or assets of the corporation in their hands which the plaintiff can reach, and they have received no payment upon any debts owed to them, as the result of their action as officers of the corporation. If the plaintiff has any cause of action against the defendants, it is an action at law sounding in tort. The facts alleged are not sufficient to give the plaintiff the right to maintain such an action, the petition does not charge the defendants with conspiracy with the attaching creditors; and such creditors are not parties to this suit. It has been well said that there can be no conspiracy to do that which is lawful, in a lawful manner. *Porter v. Mack & Boren*, 50 W. Va. 581, 40 S. E. 549. It is lawful for a diligent creditor to secure the payment of his debt from an insolvent corporation, and there is no pretense in this case

arrest; that part of it relating to the revolvers was objected to, but the objection was not kept good, and no motion was ever made to strike it out of the record. All of the testimony relating to what was found in the room, which articles included the revolvers, was afterwards detailed several times, without objection, both upon direct and cross-examination, and the plaintiff attempted to explain his possession of the revolvers, as well as the other things, when he testified in his own behalf. Again, it was proper and competent to show the situation, the surroundings and what was found in the room of the accused when he was arrested. This could not well be done without speaking of the revolvers. Evidence of this kind, where it has a bearing on or a relation to the facts constituting the crime charged, is always admissible, in a case like the one at bar, because it has a bearing on the conduct of the party accused, and, to some extent, may show on his part a consciousness of innocence or of guilt, as the case may be.

Lastly, it is contended that the court erred in admitting the evidence of the witness Van Housen, wherein he detailed the plaintiff's attempts to escape from the jail where he was confined, while awaiting his trial. In *Williams v. State*, 69 Neb. 402, it was held:

"An attempt to escape by one under arrest accused of crime is an inculpatory circumstance properly to be considered by a jury and to be given such weight as it seems fairly entitled to, with the other evidence introduced at the trial, in determining the question of the guilt or innocence of the accused." See also *George v. State*, 61 Neb. 669. *Hittner v. State*, 19 Ind. 48.

It is apparent from an examination of the record that the plaintiff had a fair trial, and, there being no prejudicial error shown, it follows that the judgment of the district court should be, and is, hereby

**AFFIRMED.**

EDWARD HOFRICHTER V. CHARLES ENYEART, ADMINIS-  
TRATOR.

FILED MAY 5, 1904. No. 13,344.

Negotiable Paper: PROTEST. Presentment, notice and protest of negotiable paper, in order to be effectual to bind an indorser, must be by one lawfully authorized by the holder to make them.

ERROR to the district court for Butler county: SAMUEL H. SORNBORGER, JUDGE. *Reversed.*

*A. M. Post*, for plaintiff in error.

*A. M. Walling and Matt Miller, contra.*

AMES, C.

On the 24th day of September, 1901, the Platte Valley State Bank issued, for value, a certificate of deposit for a sum of money payable to the order of the plaintiff in error Hofrichter, six months after date, upon a return of the certificate properly indorsed. Afterwards, and before maturity, the certificate was, for value, delivered to the intestate of the defendant in error, with the following indorsement: "Pay to the order of Jacob Enyeart. Ed Hofrichter." A few days before the instrument became due, Enyeart entrusted it, without further indorsement, to one Seiffe, with instruction to deliver it to one Stowell, a notary public, for collection or for demand, notice and protest. These instructions were wholly disregarded, and the paper never came into the possession of Stowell, but was delivered by Seiffe to a firm of attorneys who were engaged in his own service. Upon becoming acquainted with this fact, Enyeart caused to be transmitted to the firm of attorneys, over his own name, a letter which is lost, but the purport of which, as testified to by one of the recipients, was that the certificate of deposit belonged to the writer, and that he, the latter, "didn't want us to take any steps toward collecting it, or to do anything with

it whatever; that it belonged to him, and that he didn't want us to transact any business for him of any kind or character." It thus appears that the instrument, doubtless, without the knowledge of the attorneys, at the time, came wrongfully into their possession; that they were expressly notified of that fact, immediately afterwards, and that, thenceforward, they had no more right or authority over or concerning it, than if it had remained in Enyeart's pocket, except that of mere custodians or naked bailees. On the day of the maturity of the certificate, the witness whose testimony has just been quoted, from excess of caution and for his own protection, demanded payment, and, upon refusal, gave the notice and made the protest usual in such cases.

Prior to the time of the presentment, the bank had suspended business and its assets had passed into the hands of a receiver in insolvency. No other demand or notice was given. This is an action by the administrator of Enyeart, now deceased, against the indorser. Upon the foregoing facts, which are not in dispute, the court instructed a verdict for the plaintiff; and the defendant prosecutes error. The sole question litigated is, whether the demand and notice were effectual to fix the liability of the indorser. To our minds, the answer is clearly evident. The law is settled, without conflict among authorities, that a demand or notice, to be effectual to bind an indorser, or discharge the maker or drawer paying to the person making it, must be by one having real or ostensible right to receive payment. 1 Parsons, Notes & Bills, p. 387; Bigelow, Bills (2d ed.), p. 100; 2 Randolph, Commercial Paper (2d ed.), sec. 572; Zane, Banking, sec. 240; 1 Daniel, Negotiable Instruments (5th ed.), sec. 455; *Lawrence v. Miller*, 16 N. Y. 235.

The notary in this instance had neither. The instrument was not current so as to be payable to bearer. If the notary had himself demanded payment on the day before or on the day after the attempted presentment and protest, the maker would have complied, at its peril, only

after satisfying itself by inquiry that the former had become the lawful holder of the instrument by purchase and assignment, or that he was the duly authorized agent of such holder. Presumptively, such inquiry would have elicited the truth, and the maker, in a suit against it by Enyeart, would have been charged with actual knowledge of all the facts it would have learned by such a quest. Why, then, was the situation, or the rights or obligations of the parties, different on the day of maturity? Counsel has offered neither argument nor authority to convince us. It is true, as he says, that a notary, entrusted by the owner of negotiable paper with its custody, is presumably authorized by his principal to demand payment, and to give notice and make protest, but that is a matter of presumption, only, which, like other such presumptions, may be rebutted by proof of the fact. He derives no authority from his notarial commission, and his certificate of protest creates no obligation upon anyone, but is, like other official certificates of like character, merely evidence of the truth of its own recitals. The liability of an indorser is fixed, if at all, by the demand and notice, not by the certificate of protest. In this instance, the recitals themselves fall short of showing authority from the lawful and apparent owner of the paper. It is recited that he made the presentment at the request, not of Enyeart, but of "Wm. Sieffe for Jacob Enyeart." Suppose the bank to have been "a going concern," and the demand to have been in that form; would not the very phrase itself have led the bank officials to inquire by what authority Sieffe made the request? And the notice that was served upon the indorser was in the same form, saying that the presentment and demand had been made "at the request of Wm. Sieffe for Jacob Hofrichter." Can this be said to be a notice that a presentment and demand had been made at the request of the indorsee? We think not, but, if so, it was notice of a supposed fact which, as the record proves, never occurred. It is quite clear to us, therefore, not only that no lawful demand was made, but that, if one

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had been made, the paper served upon Hofrichter would not have been notice of it. Upon the facts disclosed by the record, the jury should have been instructed to return a verdict for the defendant.

It is recommended that the judgment of the district court be reversed and a new trial granted.

HASTINGS and OLDHAM, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, it is ordered that the judgment of the district court be reversed and a new trial granted.

REVERSED.

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JENNIE B. WARDELL v. JAMES W. WARDELL, ADMINISTRATOR.

FILED MAY 5, 1904. No. 13,413.

1. **Equity.** Equity has jurisdiction to supply the omissions and defects of legal procedure, when necessary to accomplish the ends of the law and to the due administration of justice.
2. **Decedent's Estate: HOMESTEAD: SALE.** When a husband dies, the owner of a tract of land selected and occupied by himself and family as a homestead, but which exceeds the value of \$2,000, and which is so situated that the dwelling house and the grounds upon which it stands, to the value of the homestead exemption, can not be set apart from the residue of the tract, the district court has jurisdiction, in equity, upon application of the administrator, to decree the sale of the whole tract for the payment of the debts of the deceased, and to direct that, of the proceeds of the sale, \$2,000 shall be invested at interest during the life of the widow, the interest and income thereof to be paid to her for her own use until her death, and, upon the happening of that event, the principal to descend as in case of other such exemptions.
3. ———: ———. A homestead exemption is by the law of this state limited to the value of \$2,000, and if, upon the death of a husband, the dwelling and the tract of land adjacent thereto, selected from his estate and occupied by himself and family as a homestead, exceeds that value and are so situated that the dwelling together with the grounds upon which it stands, and not exceeding that value, can not be set apart from the residue of the tract,



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no legal estate in the land, or in any part of it, passes to the widow and heirs under the homestead act, but in lieu thereof an equitable interest to the value of \$2,000 in the entire tract does pass to them thereunder.

ERROR to the district court for Washington county:  
CHARLES T. DICKINSON, JUDGE. *Affirmed.*

*E. C. Jackson and Clark O'Hanlon, for plaintiff in error.*

*Walton & Mummert, contra.*

AMES, C.

It is not requisite to an understanding of the sole question of importance litigated in this case that the facts shall be set forth in detail. The circumstances essential to that purpose are the following: One George Wardell died the owner of an equitable estate in 120 acres of land of the value, including that of a dwelling house and buildings thereon, of which he and his family were in occupancy as a homestead, of about \$14,000. The defendant, James W. Wardell, was appointed administrator of the estate of the deceased, and, after having exhausted all other means for the payment of debts approved and allowed against the latter, applied to the district court for a decree authorizing him to sell the homestead and apply the proceeds to the payment of a remainder of them. In this proceeding the widow intervened, and prayed that her homestead estate in the premises be protected. Upon a trial, it was found that the value of the dwelling house alone was \$3,000, and of the buildings appurtenant to it \$3,500, and of the equitable title to the lands \$7,200; and that the premises were not susceptible of division or partition so as to permit the dwelling house, and the grounds upon which it was erected, together of a value not exceeding \$2,000, to be set apart as a homestead exemption. The court thereupon decreed a sale of the entire tract, and the investment of \$2,000 of the proceeds thereof at interest during the life of the widow; she to receive the

interest and income thereof to her own use until her death, and, upon the happening of that event, the principal to descend to the heirs at law of the decedent, as in the case of other such exemptions.

From this decree, the widow prosecutes error to this court, alleging it to be unauthorized by law. Her contentions are that the provisions of the statute for appraising and setting apart of the homestead during the lifetime of the person from whose estate it was selected (in this instance the husband), or the sale of it, in instances in which it is not susceptible of division, and the setting apart of \$2,000 of the proceeds of the sale, are not applicable after his death, and that hence the statutory restriction as to the value of the exempt property ceases with that event, and that therefrom the entire premises occupied as a homestead, to the whole extent of the territorial limits prescribed by statute, acquire the character of exemption regardless of values. Counsel thus attempt to found a title to real property upon the absence or defect of expressly prescribed legal procedure for attacking the person in possession. It was largely for the purpose of supplying such omissions in legal machinery, and preventing them from becoming the means or occasion of injustice, that courts of equity were instituted. We entertain no doubt that, for this reason alone, if for no other, the present circumstances call for the beneficial exercise of the jurisdiction of a court of chancery. This being so, the court properly adopted such methods of practice and procedure as are customary with it, and were adapted to the situation and to the accomplishment of the desired end, and committed no error in omitting to appoint appraisers as though the proceeding had been pursuant to the statute; it not being made to appear that any error in valuation resulted in such omission. The contention that equity was without jurisdiction because the claims had not been reduced to judgment in the lifetime of the debtor, we can not think to have been seriously made. The nearest possible approach thereto had been attained

by the proof and allowance of them before the probate court.

Counsel for plaintiff in error lay much stress upon the proposition, often reiterated by this court, that, upon the death of a married person from whose lands a homestead was selected, an estate for life therein vests in the surviving spouse, leaving an unincumbered reversion in fee in the heirs of the deceased, also vested. Hence, they say, such estate in an entire tract not exceeding 160 acres, however valuable, having passed in this manner, free from general or special liens created in the lifetime of the decedent, the law having prescribed no condition subsequent upon which it may divest, the land ceased to be a part of the estate of the latter or liable for debts contracted by him.

We think this reasoning is at fault in overlooking the fact that that which constitutes the homestead, and that alone, therefore, which passes to the surviving spouse, in cases of this kind, is not necessarily any defined tract of land, but only so much of a definable tract, if any, as, including the dwelling house and appurtenances, shall not exceed \$2,000 in value; and, inasmuch as the homestead exemption is rigidly limited to that value, if there be no describable tract, including the buildings, the value of which falls within that sum, there is no property answering to the statutory definition of a homestead; and, if the statute were to be literally adhered to, nothing would pass under it to the survivor or to the heirs. So literal an interpretation of the statute as is contended for by counsel would, in our opinion, deprive the widow of all interest other than dower in the premises in question, and devote the entire property to the payment of the debts of her late husband. Such an outcome would obviously defeat the benevolent and plain intent of the legislature, however inadequately expressed; and, the statute being remedial in character, we think a court of equity is justified in holding that, although, under the circumstances, no legal estate in the land or any of it can pass under the

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act, yet, an equitable interest therein of the value of \$2,000 does so pass, and that the court will protect it in case it becomes necessary to appropriate the tract to the payment of the debts of the deceased.

We discover no error in the record, and recommend that the judgment of the district court be affirmed.

LETTON and OLDDHAM, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, it is ordered that the judgment of the district court be

AFFIRMED.

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J. E. EBERSOLE V. OMAHA NATIONAL BANK.

FILED MAY 5, 1904. No. 13,517.

1. **Debt: PART PAYMENT: STATUTE OF LIMITATIONS.** A part payment operates to revive a contract debt, barred by the statute of limitations, of its own vigor and not as evidence of an acknowledgment or new promise.
2. **Evidence.** The evidence in this case held to be insufficient to support the defense of the statute of limitations.

ERROR to the district court for Douglas county: GUY R. C. READ, JUDGE. *Affirmed.*

*Frank Heller*, for plaintiff in error.

*Hamilton & Maxwell*, contra.

AMES, C.

This is a proceeding in error to reverse a judgment, pursuant to a verdict for the plaintiff below, returned in obedience to a peremptory instruction by the court. The action was upon a book account and three promissory notes of the defendant. The defense was the statute of limitations. The notes were dated and given January 31, 1893, and were payable on demand. The book account

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was of transactions extending from that date until November 30, 1897. The plaintiff below is assignee of the payee of all these obligations. At some time, not specified by counsel, the debtor delivered to the payee, one J. A. Fuller & Co., a policy of insurance upon the life of the former, as collateral security for the payment of the indebtedness. On February 12, 1898, the policy was entrusted to the debtor to enable him to obtain its cash surrender value, and pay the proceeds upon the indebtedness, and to substitute a new policy for the old one. On the 14th of July, 1898, the debtor transmitted the money and the new policy to his creditors, inclosed with the following letter:

*"Messrs. J. A. Fuller & Co., Omaha—GENTLEMEN:*  
Herewith please find policy number 120,968 on my life, assigned to J. H. Dumont, to secure payment of my indebtedness to him and you. Also check for \$75.35, dated August 1, 1898, being the amount of the surrender value of the policy of like amount held by you for the same purpose, the cash value clause of which was extended until next anniversary on account of payment of last premium by note. Paid up insurance becomes automatic under the policy condition.

"Respectfully,

JAMES E. EBERSOLE."

There was no later communication between them. Fuller & Co. applied a part of the money, proceeds of the check, on each of the notes, and a part on the book account. This action was begun within 4 years thereafter. The maker contends that the notes were barred, and therefore no longer a subsisting indebtedness against him, and that all the money should have been appropriated toward the payment of the book account as being the only indebtedness of his to which it was applicable, or, in other words, that his creditors were without authority to make use of the money to revive the obligation of the barred notes.

The statute enacts (code, sec. 22): "In any cause founded on contract, when any part of the principal or interest shall have been paid, \* \* \* an action may

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be brought in such case within the period prescribed for the same, after such payment." The section provides that the debt may also be revived by a new promise or acknowledgment in writing, so that it would seem that a part payment does not effect the removal of the bar, because of being evidence of a new promise or of an acknowledgment, which are void if not written, but because of its own proper vigor. This being so, authorities cited by plaintiff in error, deciding that the holder of collateral who collects the same can not apply the proceeds upon barred debts, because his right to collect and appropriate does not include authority to make a new promise or an acknowledgment for his debtor, seem to us to be not in point. Here, as it seems to us, the only question is, whether the application of the money to the barred notes was a lawful appropriation of it. If it was so, it constituted part payment upon them, and had all the legal consequences of any other such part payment. If it was not, the payee is accountable for the money, in the same manner, and to the same extent, as in any other case of tortious conversion or embezzlement of trust funds. We can not think that any court would hold him so liable. The debt upon the notes was not discharged, but remained a moral obligation. The letter gave, in effect, general authority to apply the proceeds of the collateral to the payment of the indebtedness of the maker, without specifying in what manner it should be distributed among the different descriptions thereof, and we do not see that the creditor exceeded his authority.

The question was discussed somewhat at the bar, whether the statute ever ran against the notes. They were payable on demand, and no demand of their payment seems ever to have been made. They were secured, in part at least, in common with the book account, by collateral, and, until within less than 5 years before the beginning of the action, business relations and transactions other than with reference to these obligations continued between the parties. If the intent of the parties may be gathered

from their conduct, the substitution of collateral and the payment of money above related had as direct reference to the notes as to the book account. The old policy was admittedly collateral to the notes. When it was entrusted to the plaintiff in error, he gave a written receipt for it, reciting that its cash surrender value and a new policy were to be "substituted" for it. That is, to take the place of it and to be charged with the same duty and obligation as it had been bound for. This transaction was within 2 weeks after the lapse of 5 years from the date of the notes. Under such circumstances we are inclined to think that the receipt was written acknowledgment of the debt evidenced by the notes, but, whether it was so or not, we do not think that the record discloses such an unreasonable delay in demanding payment of the notes as would operate to bar them under the statute, 5 months later, when the plaintiff in error substituted the new policy and made the partial payment in controversy.

It is recommended that the judgment of the district court be affirmed.

LETTON and OLDHAM, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, it is ordered that the judgment of the district court be

**AFFIRMED.**

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OMAHA LOAN & TRUST COMPANY ET AL., APPELLANTS, V.  
CITY OF OMAHA ET AL., APPELLEES.

FILED MAY 5, 1904. No. 13,533.

**Judicial Sale: ESTOPPEL.** A purchaser at a judicial sale of lands offered subject to apparent liens, who makes no attempt to have the priority, validity or amount of the latter otherwise adjudicated until after confirmation and conveyance, is estopped to impeach them.

APPEAL from the district court for Douglas county:  
IRVING F. BAXTER, JUDGE. *Affirmed.*

*H. W. Pennock*, for appellants.

*W. H. Herdman*, contra.

AMES, C.

Appellants were purchasers at mortgage foreclosure sale of three tracts of land situate in the city of Omaha. The sheriff's appraisers deducted from the gross value of each tract, as found by them, a certain sum as being a lien thereon in favor of the city, because of a special assessment and levy to defray the cost of local improvements. After procuring confirmation and conveyances pursuant thereto, appellants brought this action to perpetually enjoin the city from enforcing the collection of the taxes, for the alleged reason that the tax proceedings were in violation of law and void. Two of the tracts were purchased for slightly more than two-thirds of the gross amounts of the appraisements respectively, and the other for two-thirds of that amount less the assumed amount of the tax lien. There was a judgment for the city with respect to all. Appellants try to distinguish in principle between the purchase of the former two lots and that of the latter, because, as counsel urges, although it may be said to have been advantaged or benefited by the deduction in one instance, it was not so in the other. But this very point was decided otherwise, and we think rightly so, in *Battelle v. McIntosh*, 62 Neb. 647. The two principal objects of the appraisement law are to protect the judgment debtor from spoliation by the forced sale of his property below its fair value, and to inform the judgment creditor of the existence and amounts of apparent prior liens upon it, so that he may not unwittingly bid for it more than it is worth; but neither of them dispenses with or affects the rule of  *caveat emptor*  as applied to purchasers at judicial sales. If the purchase is made at more



than two-thirds of the amount of the "net appraisal" as it is called, that fact, by itself, indicates nothing but that the bidder believes the gross appraisement to be below the unincumbered value of that which he is buying. Presumably, in such cases, he reappraises the land in his own mind, and bids for it what he believes it to be worth, subject to the prior liens appearing upon the face of the record. He has thus had all the advantage of the appraisement and notice he could have otherwise had, and no injustice has been done him. For the rest, appellants attack the long settled rule, that a purchaser at a judicial sale of lands, offered subject to apparent liens disclosed by the appraisement, who makes no attempt to have the priority, validity or amount of the latter otherwise adjudicated, until after confirmation and conveyance, is estopped to impeach them. Decisions enforcing this rule are very numerous, extending through the past 13 years. *Koch v. Losch*, 31 Neb. 625; *Viergutz v. Aultman, Miller & Co.*, 46 Neb. 141; *Nye & Schneider Co. v. Fahrenholz*, 49 Neb. 278; *Norfolk State Bank v. Schwenk*, 51 Neb. 146; *Farmers' Loan & Trust Co. v. Schwenk*, 54 Neb. 657; *Peterborough Savings Bank v. Pierce*, 54 Neb. 721; *Arlington Mill & Elevator Co. v. Yates*, 57 Neb. 286.

It would be an unprofitable task to attempt to re-examine the principles by which the foregoing decisions are thought to be justified. The court has recently done so and found them satisfactory. It should be sufficient to say that they have long since acquired the character of a rule of property, and, if their operation is considered unjust, the legislature is the proper forum in which to seek remedy. The assumption by appellants' counsel that these decisions, or any of them, are overruled, or in any wise shaken, by the opinion of this court in *Hart v. Beardsley*, 67 Neb. 145, is wholly unwarranted. The principles by which they are governed are not involved in that case, and the then Chief Justice, SULLIVAN, in writing the leading opinion, paused to refer to them only for the purpose of stating that fact. The present Chief Justice, HOLCOMB,

prepared a concurring opinion, for the sole purpose, as appears, of declaring and emphasizing the intention of the court to adhere to them in all future cases to which they shall be applicable. Judge SEDGWICK also wrote a concurring opinion, in which he set forth, briefly, some of the conditions and qualifications upon which he supposed their applicability to depend, none of which he deemed pertinent to the case then under discussion. In *Omaha Savings Bank v. City of Omaha*, 4 Neb. (Unof.) 563, and *Equitable Trust Co. v. City of Omaha*, 69 Neb. 342, the rule in question was again recognized and enforced, although the attention of the court was expressly called to *Hart v. Beardsley*, *supra*, by Chief Justice SULLIVAN, in a paragraph by which he dissented, without, however, stating his reasons for so doing beyond a bare reference to the case last mentioned.

Counsel for the appellants seeks to distinguish between this case and those cases in which it is attempted to enforce alleged liens as incidental or collateral to personal obligations. It seems to the writer that such a distinction would be reasonable and just. The existing rule may often sacrifice the property of financially embarrassed, and therefore helpless, debtors for the satisfaction of illegal demands from which their more fortunate, because wealthier, neighbors will escape without difficulty. But we suppose this phase of the matter to have been hitherto considered by the court as insufficient to warrant the modification suggested, and that it is not worth while to pursue the subject. We therefore conclude that the contentions of the appellants have been deliberately and finally discredited by this court, and that their further discussion would be bootless.

It is recommended that the judgment of the district court be affirmed.

HASTINGS and OLDHAM, CC., concur.

By the Court: For the reasons stated in the foregoing

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Chadron Opera House Co. v. Loomer.

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opinion, it is ordered that the judgment of the district court be

AFFIRMED.

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CHADRON OPERA HOUSE COMPANY, APPELLANT, v. SHEL-  
DON M. LOOMER ET AL., APPELLEES.

FILED MAY 5, 1904. No. 13,585.

**Trade Name.** To entitle a party to an injunction restraining another from the use of a trade mark or trade name, he must make it appear, with at least reasonable certainty, that his adoption of the name was prior in time to that of his adversary, that he adopted and made use of it in such manner as to reasonably apprise the public that he intended it as a distinctive appellation for his trade, commodity or place of business, and that it was not, at the time of his attempted appropriation of it, in common or general use in connection with like businesses, commodities, buildings or localities.

APPEAL from the district court for Dawes county:  
WILLIAM H. WESTOVER, JUDGE. *Affirmed.*

*Allen G. Fisher*, for appellant.

*A. W. Crites*, contra.

AMES, C.

This is an appeal from a decree dismissing the plaintiff's action after a trial upon the merits. Appellant, a corporation, brought the suit as lessee of a building, in Chadron, styled "The Chadron Opera House," seeking to enjoin the use of the same name for the carrying on of a business similar to that of the plaintiff in, and in connection with, another building in Chadron.

The evidence is in some conflict and confusion but, as nearly as we can make out, the appellees, defendants below, are conducting their business in a frame building, erected in 1886 for a skating rink, but provided with a stage and drop curtains, and some other appliances adapt-

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Chadron Opera House Co. v. Loomer.

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ing it to use as a place of dramatic entertainment, to which it became subsequently mainly, if not solely, devoted. It seems to have been known for some time by the names, indifferently, of "The Rink" and "The Rink Opera House," and is still perhaps more or less commonly known by one or the other, or both. In or about 1896, defendants began, in correspondence and conversation with play actors and others, to style their building the "Chadron Opera House," and some three years later caused that name to be painted upon its outer walls. Since that time the three names have more or less generally and indiscriminately been applied to it by the public.

In 1889, one Nelson erected the building, of brick, in which the business of appellant is carried on. The lower story of the structure was and is adapted to and used for business rooms, and the rear part of the upper story for a place of entertainment. Upon a stone let into the front of it were engraved the words "P. B. Nelson, Opera Block." Subsequently, Nelson and the public habitually referred to the building indiscriminately by the names "Nelson's Opera House" and "The Opera House." Shortly before the beginning of this action, he and appellant adopted the custom of calling it the "Chadron Opera House," but that was not until after that name had been painted on the defendants' building and they had been using it some time in their correspondence, conversation and otherwise. As to whether Nelson or the defendants first begun this latter use of the name, the evidence is in conflict and the fact uncertain. The plaintiff was incorporated in April, 1903, by the name of the "Chadron Opera House Company," apparently about the time Nelson begun adding the name of the town to that of his building. We do not think there is thus disclosed such a distinctive prior adoption and appropriation of the name by the appellant as to entitle it to the exclusive enjoyment of it, or to the relief prayed. For some unaccountable reason, the briefs and arguments of both counsel are on the same side of this question, and that, the one which is the oppo-

site of that which seems to us the more applicable to the circumstances.

It seems evident to us that, before one can avail himself of the extraordinary remedy of injunction to protect him in the exclusive possession and enjoyment of a trade mark or trade name, he must have acquired, to use a common law expression, an exclusive "seizin" of it. This record does not disclose that either of the litigants have done so. On the contrary it is apparent that both have made use of the coveted name, if not in common, at least contemporaneously, and, for a time at least, each without the knowledge of the other, and without any definite intention to enjoy such use exclusively. In other words, neither seems, until about the time this litigation was begun, to have attempted to appropriate the name to his own peculiar and exclusive use, or to adopt it as a sole or principal designation of his building or business.

We have ourselves not succeeded in finding decisions precisely in point in this respect, but we think that the general principles underlying the authorities upon this subject uphold the conclusion that, to entitle a party to the remedy here sought, he must make it appear, with at least reasonable certainty, that his adoption of the name was prior in time to that of his adversary; that he adopted and made use of it in such manner as would reasonably apprise the public that he intended it as a distinctive appellation for his trade, commodity or place of business, and that it was not, at the time of his attempted appropriation of it, in common or general use in connection with like businesses, commodities, buildings or localities. See 26 Am. and Eng. Ency. Law (1st ed.), p. 324, and notes. However, whether the foregoing formula is correct or not, we are satisfied that this record is insufficient to support a judgment for the plaintiff, and recommend that the judgment of the district court be affirmed.

LETTON and OLDHAM, CC., concur.

By the Court: For the reasons stated in the foregoing

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Card v. Dawes County.

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opinion, it is ordered that the judgment of the district court be

**AFFIRMED.**

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**LEE CARD V. DAWES COUNTY.**

**FILED MAY 5, 1904. No. 13,587.**

**Counties: AUTHORITY OF COUNTY ATTORNEY.** A county is not bound to pay for legal services rendered at the instance of the county attorney, without the previous authorization or subsequent official ratification of the county board.

**ERROR to the district court for Dawes county: WILLIAM H. WESTOVER, JUDGE. *Affirmed.***

*Allen G. Fisher, for plaintiff in error.*

*E. M. Slattery, contra.*

**AMES, C.**

In 1902, Dawes county seems to have engaged extensively in the business of the foreclosure by the county, as plaintiff, of delinquent tax liens upon real property situate within its territorial limits. The county attorney procured the plaintiff in error, Card, who was an attorney at law, to assist him in compiling the data requisite for the purpose, in a very large number of cases, and in the formulation of pleadings and preparation of notices for publication necessary to be employed in the foreclosure suits. It is not disputed that the services so rendered by Card were of the reasonable value of \$150, or that he was assured by the county attorney that the county would compensate him therefor. But the county board is not alleged to have authorized the employment, or officially, and as a body, to have subsequently ratified or affirmed it, although some of its members, perhaps while the board was in session, are testified to have approved of it, if not to have given assurance of its ratification. That the county

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McAdams v. City of McCook.

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attorney availed himself of this service, and that thus the county may have derived an indirect benefit therefrom, is not disputed, though it is not clear that the county attorney could not or would not have done the work himself, if he had not persuaded Card to do it for him. This is the whole case, as we gather it from the briefs and the record which were submitted without oral argument.

Card presented his claim for the services in question to the county board, by whom it was rejected, and, upon appeal, the district court affirmed their order. From the judgment of affirmance this proceeding is prosecuted. We can discover no error. The county board appears not to have employed the plaintiff in error, or to have authorized his employment by the county attorney, or to have officially ratified the latter. However meritorious the services of plaintiff in error may have been, and that they were largely so is not disputed, his claim for compensation for them from the county appears to have no legal foundation, the mere fact that the county may have benefited from them does not obligate it in a case like the present, in which it had no direct connection with their rendition, and no official opportunity to decline their reception.

It is recommended that the judgment of the district court be affirmed.

LETTON and OLDHAM, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, it is ordered that the judgment of the district court be

**AFFIRMED.**

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**JAMES MCADAMS V. CITY OF MCCOOK.**

FILED MAY 5, 1904. No. 13,502.

1. Cities: ABANDONING SEWERS: LIABILITY. When a city makes provision by sewers or drains for carrying off the surface water, it may not discontinue or abandon the same, when it leaves the lot

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McAdams v. City of McCook.

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owner in a worse condition than he would have been if the city had not constructed such drains.

2. **Instructions: Review.** It is a well established rule of this court that an instruction, not warranted by the pleadings or evidence, will require a reversal of the judgment if it have a tendency to mislead the jury. *Esterly & Son v. Van Slyke*, 21 Neb. 611, followed and approved.

3. ———. Instructions examined, and found prejudicial.

**ERROR** to the district court for Red Willow county:  
**ROBERT C. ORR, JUDGE.** *Reversed.*

*W. S. Morlan*, for plaintiff in error.

*W. R. Starr and Fayette I. Foss*, contra.

**OLDHAM, C.**

This is an action for damages for injuries sustained by the flooding of the basement of plaintiff's storeroom in the city of McCook. The material facts underlying the controversy are, that the city of McCook is situated in a basin, with the elevation rising from the southeast to the northwest of the corporate limits of the city, and is surrounded on the north and west by a line of bluffs, so that the natural flow of the surface water in the city, if unimpeded, would be from the northwest to the southeast. Main street is the principal business street of the city, and runs north and south. Manchester avenue is the street immediately west and parallel with Main street. Dennison street is a street running east and west and crossing both Main and Manchester at right angles. Railroad street runs parallel to and south of Dennison. Dodge and Douglas streets are each north and parallel with Dennison street. Plaintiff in the court below, who is also plaintiff in error in this court, conducted a general merchandise store in a building situated on the northeast corner of Main and Dennison streets. The building has 25 feet frontage on Main, and 80 feet frontage on Dennison street. On the 17th day of June, 1901, the city of Mc-



Cook was visited by a very severe rainstorm, in which 2 and 6-10 inches of water fell in a period of 35 minutes; the rain was accompanied by hail and a high wind. As a result of this storm, the basement of plaintiff's store was filled with water and the goods situated therein were damaged to the extent of about \$534. The fact and the extent of the damage are undisputed. In the petition filed by plaintiff it is alleged, in substance, that several years prior to the injury the city of McCook had constructed a system of drains, ditches and culverts for the purpose of conducting the surface water through the city, across Railroad street and into the natural basin south of the city. That in the construction of this system of drainage, it had, by means of its ditches and culverts, diverted the flow of the surface water north of plaintiff's building, westward along Douglas street from Main street to Manchester avenue, and had conducted the water from thence south, by means of a system of ditches and culverts, down to and across Railroad street; that for 3 or 4 years before the injury, the city had carelessly and negligently permitted the embankment on the east side of Manchester and between Dennison and Dodge streets to be worn down and reduced to a level, by permitting teams and vehicles to drive over and across the embankments of the drain; that when the heavy rainfall occurred on the 17th day of June, the system of drainage established by the city diverted and conducted the surface water north and west of plaintiff's building over to Manchester avenue, and carried it down in heavy torrents to the place just north of Dennison street where the embankment had been leveled down, and precipitated it from this place in a southeasterly direction over and against the north side of plaintiff's building, thereby occasioning the injury complained of. There was no allegation in the petition that there was any carelessness or negligence in the original construction of the drainage system. It appeared from the testimony that the level of Manchester street was two feet above the level of Main street.

The city, in answer to plaintiff's petition, denied negligence in permitting the drains and culverts to be and remain in an unsafe condition, and alleged that plaintiff's injury was occasioned by the "act of God," and that the storm on the 17th of June was of such an unusual and unprecedented character, that ordinary prudence on the part of the city in keeping its drains and culverts in proper condition would not have protected against the injury. On the issues thus joined there was trial to a jury, judgment for the defendant, and plaintiff brings error to this court.

The only complaint urged by plaintiff which it will be necessary to examine, in view of the conclusion soon to be reached, is as to the action of the trial court in giving misleading, confusing and contradictory instructions in his charge to the jury. However, before going in detail into a discussion of the objections, it is perhaps well to suggest, as the matter is in controversy, that plaintiff's petition does state a good cause of action, and that there is competent testimony in the record sufficient to sustain a judgment for the plaintiff, had he prevailed in the court below. While the petition, as before set out, does not charge any negligence on the part of the city in the original construction of the drainage system, yet it does charge with great precision, that the city negligently permitted the drains and ditches, particularly on the east side of Manchester avenue and north of Dennison street, to be leveled down by passage over the ditches, and to remain in such condition for a long period of time prior to the injury complained of. While it is rightly urged on the part of the city that it was under no obligations to construct a system of drainage for protection from the surface water, yet it does not follow, because in the first instance the city was not bound to construct this system of drainage, that this absolved it from liability for injury occasioned to private property by its failure to keep the ditches in proper condition after they had been erected. When a city makes provision by sewers or drains for

carrying off the surface water, it may not discontinue or abandon the same when it leaves the lot owner in a worse condition than he would have been if the city had never constructed such drains. *City of Atchison v. Challiss*, 9 Kan. 603.

It is also urged by the city, that the injury complained of by the plaintiff was occasioned by surface water, which is a common enemy, and that for injuries arising from this source no one is liable. This contention, however, so far as it applies to cases of this character, is qualified by the principle that the city, like a private individual, must so use its own as not to injure another. *City of Kearney v. Thernanson*, 48 Neb. 74.

While it is practically conceded on the part of the city that some of the instructions given by the trial court had, as they say in their brief, "better have been left out," yet it is contended that, under the evidence, no other verdict could have been reached, because the testimony clearly shows that the injury was occasioned by such an unusual rainfall, accompanied by hail and wind, as to constitute an "act of God." While there is testimony on the part of the city tending to support this contention, there is also evidence, as before suggested in this opinion, on the part of the plaintiff, which tends to show that his injury was caused by a precipitation of surface water, diverted by the ditch from its natural course, and discharged against his property, over the low bank on the east side of the drain on Manchester avenue, a few feet north of Dennison street. Consequently there was this issue of fact involved in the controversy, which should have been submitted to the jury under proper instructions. And we think that the learned trial judge might, and probably would, have clearly and concisely directed the jury on this question, had he not given so many instructions. 5 instructions were given at plaintiff's request, 12 at defendant's request, and 11 on the court's own motion; and among the different ones so given there is a babel of confusion.

It is a well established rule of this court, that an instruction, not warranted by the pleadings or evidence, will require a reversal of the judgment if it have a tendency to mislead the jury. *Esterly & Son v. Van Slyke*, 21 Neb. 611.

In the 19th instruction, requested by defendant and given by the court, it was said: "The jury are instructed that, for a mere error in judgment in the adoption of a plan or system of sewerage or drainage, a city can not be held responsible." Without determining whether this instruction correctly states an abstract proposition of law, it is certainly foreign to any issue involved in this controversy, for, as already set out, plaintiff did not contend that there was any negligence or carelessness in the construction of the system of drainage. The vice of this instruction is, that it might have led the jury to conclude that, unless plaintiff alleged and proved negligence in the construction of the drainage system, the city was not liable.

The 12th instruction given by the court at the request of defendant was as follows: "The jury are instructed that, unless you believe from the evidence in this case that the defendant city had been careless and negligent in the grading and establishment of the grade for the sewers and drains as alleged in plaintiff's petition, then the jury should find for the defendant, and the burden is upon the plaintiff to prove, by a preponderance of the evidence, that the defendant city was careless and negligent as alleged in plaintiff's petition." This instruction was plainly misleading, and might, and probably would, cause the jury to go no further in their investigation than to determine whether or not the city had been negligent in grading and ditching its streets, and then, having found this fact, as they were bound to do, in the defendant's favor, render a verdict accordingly. There are other instructions equally as objectionable which it will not be necessary to consider, since, for errors already pointed out, we recommend that the judgment of the district court

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be reversed and the cause remanded for further proceedings.

AMES and LETTON, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is reversed and the cause remanded.

**REVERSED.**

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WILLIAM E. MUELLER V. WILLIAM N. PARCEL ET AL.

FILED MAY 5, 1904. No. 13,557.

1. Chattel Mortgages: PRIORITIES. A verbal chattel mortgage, not coupled with possession by the mortgagee, will not take precedence over a subsequent written mortgage, taken without notice of the secret lien of the verbal mortgage.
2. Rulings. Action of the trial court in admission of evidence examined, and held not prejudicial.
3. Replevin: VERDICT: SPECIAL FINDING. Where plaintiff was in possession of the property replevied, under a claim of a special ownership as mortgagee, and the jury returned a verdict finding the right of property and the right of possession in plaintiff, and that the value of this right in said property was \$117.17, the amount due on the mortgage, and the general verdict was supplemented with a special finding that the value of the property is \$160, held, that such verdict and special finding are sufficient to sustain a judgment that plaintiff is entitled to the possession of the property, and that the value of his special property in the goods replevied is \$117.17.

ERROR to the district court for Lincoln county: HANSON M. GRIMES, JUDGE. *Reversed with directions.*

*Hoagland & Hoagland* for plaintiff in error.

*A. H. Davis* and *Beeler & Muldoon*, contra.

OLDHAM, C.

This is an action of replevin instituted by the plaintiff against the defendants to recover possession of 400 bushels

of corn, under the claim of special ownership based on a chattel mortgage held by the plaintiff on the corn in controversy. There was a judgment for plaintiff in the court below, and the defendant William E. Mueller alone brings error to this court.

The facts underlying this controversy are, that defendant William E. Mueller is the owner of a farm in Lincoln county, Nebraska, and that, in the year 1902, J. H. Nagle cultivated a crop of corn on a portion of defendant's lands for two-fifths of the corn raised on the lands so cultivated; that about the time the corn was gathered he, Nagle, executed two chattel mortgages on this corn. One of these mortgages was executed to the plaintiff, and the other to one Young, who assigned and sold the same to plaintiff before the suit was instituted. Each of these mortgages was given to secure a *bona fide* indebtedness to the respective mortgagees. It appears that before the corn was gathered, defendant William E. Mueller went on a visit to Oregon, and left his property in charge of his wife. It also appears that defendant Herman Mueller, who is a son of William E. Mueller, entered into a contract with Nagle to gather and crib the corn, and to deliver a certain portion thereof to plaintiff Parcel, for a consideration named in the contract with Nagle. After the corn was gathered, plaintiff demanded possession of the amount covered by his mortgage, and was refused possession by Mrs. Mueller and Herman Mueller, and this suit was instituted, naming all these parties as defendants. They were all summoned, and appeared and answered. Defendant William E. Mueller filed a general denial. Mrs. Mueller answered, disclaiming any ownership in the property, and alleging that she held possession of the corn in controversy as agent of her husband. Herman Mueller answered, disclaiming ownership, and denying that he had ever had possession of the corn as agent of defendant Nagle. Under the issues thus formed, the court, over the defendants' objection, permitted the plaintiff to allege and prove the contract of Nagle with Herman Mueller to

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gather and crib the corn. This is one of the alleged errors called to our attention in the brief of William E. Mueller, and will be presently considered. Defendant William E. Mueller contended, first, that Nagle had no property in any portion of the corn, because the land had never been leased to him, and he had abandoned his contract to cultivate the land for two-fifths of the corn raised thereon. This issue, however, was fairly submitted to the jury on conflicting testimony, and was found in plaintiff's favor. Defendant's second contention was that, if Nagle was the owner of two-fifths of the corn raised and cribbed on the Mueller land, then the defendant was entitled to the possession of the corn so raised, on a verbal chattel mortgage made by Nagle to defendant to secure an advancement of money, prior to the execution of the mortgages relied upon by plaintiff. There is no evidence in the record tending to show that plaintiff had either actual or constructive notice of this secret lien of defendant, if it ever in fact existed. The court, however, submitted this defense to the jury in paragraph 4 of the instructions requested by defendant, saying in substance that, if they believed that an agreement for such lien was verbally entered into between Nagle and defendant Mueller, prior to the execution of the mortgages in suit, and that defendant had retained possession of such corn under such agreement, then they would find for the defendant for the value of his lien. This instruction of the trial court appears to have submitted this defense to the jury under conditions as favorable as defendant was entitled to, either under the law or the testimony contained in this record.

The action of the trial court, in permitting the plaintiff to plead and prove that Nagle employed defendant Herman Mueller to gather and crib the corn for him, is complained of as having been prejudicial to the interest of defendant William E. Mueller. We think, however, that this testimony was properly admitted for the purpose of showing that Nagle, after cultivating the corn, had employed Mueller to gather and crib it, as he, Nagle, was

bound to do under his contract. The court, however, instructed the jury that they were not to take this contract into consideration as affecting the rights of the defendant William E. Mueller in any manner, as he was not shown to have been a party to it. Consequently, William E. Mueller, who alone brings error, is in no shape to complain of this evidence.

It is next contended that the verdict of the jury and judgment of the court rendered thereon are fatally defective, and that, for this reason alone, the case should be reversed and remanded. The form of the verdict returned by the jury was as follows: "We, the jury in this case, being duly sworn and impaneled, do find and say that the right to the property and possession of said property when this action was commenced was in plaintiff, and that the value of this right in said property was the sum of \$117.17." It is contended that this verdict is fatally defective, in that it finds both the right to the property and the right of possession in plaintiff, when he only alleged a special property interest, by virtue of his chattel mortgage, in his affidavit and petition. And we are cited to the case of *Hayes v. Slobodny*, 54 Neb. 511, as decisive of the question. In *Hayes v. Slobodny*, as in the case at bar, the plaintiff had secured possession of the property on his writ of replevin, and alleged a claim to a special and not a general ownership therein. The verdict in that case was in the following form: "We, the jury, duly sworn and impaneled in the above entitled cause, do find that the right of the property and right of possession of said property when this action was commenced was in the plaintiff and assess his damages in the premises at the sum of one cent."

In disposing of this case, RYAN, C., speaking for the court, says, "At the time of the trial the replevied property was in his (plaintiff's) possession, and with reference to that property there was no finding as to the value of his possession as in such cases required by the provisions of section 191a, code of civil procedure, but the finding in his



favor was of general ownership and an unlimited right of possession." There is an unfortunate reference in this opinion to section 191a of the code, as controlling the form of the verdict in the case, where plaintiff has possession of the goods replevied, either under a claim of general or special ownership. The form of a verdict in his favor is prescribed by section 192, and not by section 191a of the code. The opinion, however, in *Hayes v. Slobodny*, *supra*, turned on the question that the verdict was not supported by the pleading. Now in the case at bar, the jury, by special finding, answered that the value of the property in plaintiff's possession was \$160 and by their verdict they found that plaintiff's interest in this property was of the value of \$117.17, which was the amount due on the notes and mortgages. While the verdict was technically erroneous in finding that the right of the property as well as the right of possession was in the plaintiff, yet we think this error was cured by finding the value of plaintiff's property in the replevied corn. The general rule is that where the successful party in a replevin action claims less than the full interest in the property replevied, the value of his interest should be fixed. *Cobbey, Replevin* (2d ed.), sec. 854.

While it is always good practice to follow this rule, yet our code does not require it to be followed, where plaintiff prevails in the action and is possessed of the property replevied. In such case, it is only required that the jury by their verdict shall assess adequate damages to the plaintiff for the illegal detention of the property, and for costs. Now, it seems to us, that the general verdict of the jury, finding the right of property and the right of possession in the plaintiff, should have been construed in the light of the special finding, as a determination by the jury that plaintiff was entitled to the possession of the property in dispute as mortgagee, and that the value of his special property was intended to have been determined by the jury at \$117.17, the amount of his debt and interest, and that the value of the property was \$160. We think

this verdict was sufficient to have supported a judgment by the trial court, finding plaintiff entitled to the possession of the property, and that the value of his special property in the corn replevied was \$117.17, and awarding him a judgment for the costs of the suit. Instead of rendering such a judgment as this, the trial court rendered a judgment finding generally for plaintiff. In this, we think, there was technical and possibly substantial error. But as we are of opinion that the verdict of the jury was modified by its special finding, which supports a judgment as above suggested, we recommend that the judgment of the district court be reversed and the cause remanded, with directions to the district court to enter a judgment on the verdict of the jury, finding that plaintiff is entitled to the possession of the property replevied, under his mortgage lien, and that the value of his possession was, at the time of the return of the verdict, \$117.17, with interest at 7 per cent. from the date of the verdict, and that he recover his costs.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is reversed and the cause remanded, with directions to the district court to enter a judgment on the verdict of the jury, finding that plaintiff is entitled to the possession of the property replevied, under his mortgage lien, and that the value of his possession was, at the time of the return of the verdict, \$117.17, with interest at 7 per cent. from the date of the verdict, and that he recover his costs.

REVERSED.

BLANCHE COLEMAN AND HELEN R. COLEMAN, A MINOR, BY  
HER NEXT FRIEND, BLANCHE COLEMAN, APPELLANTS.  
V. S. W. MCGREW, EXECUTOR, ET AL., APPELLEES.

FILED MAY 5, 1904. No. 13,575.

1. **Fraternal Insurance Certificates: PROCEEDS: INJUNCTION.** Under the provision of section 97, chapter 43, Compiled Statutes, the proceeds of a certificate of a fraternal benefit association are not, before payment to the person entitled thereto, liable for any debt of a certificate holder, or of any beneficiary named in such certificate.
2. **Equity: TRUSTS.** A court of equity has jurisdiction to enjoin a trustee from the misappropriation of trust funds at the suit of a *cestui que trust*.

APPEAL from the district court for Gage county:  
CHARLES B. LETTON, JUDGE. *Reversed*.

*E. O. Kretsinger and M. B. Davis, for appellants.*

*Griggs, Rinaker & Bibb and Reavis & Reavis, contra.*

OLDHAM, C.

On April 14, 1897, Robert W. Coleman and Alice M. Coleman, his wife, signed and delivered their promissory note to the State Bank of Humboldt, Nebraska, for the sum of \$350, with interest at the rate of 10 per cent. On the 2d day of July, 1897, Robert W. Coleman departed this life, and on the 28th day of August, 1897, Alice M. Coleman also departed this life, leaving the defendant, S. W. McGrew, as executor of her last will and testament, and plaintiffs Blanche Coleman and Helen R. Coleman as sole legatees of the will. Defendant S. W. McGrew, executor of the estate of Alice M. Coleman, was also the personal representative of the estate of Robert W. Coleman. The note of the defendant bank was proved against each of these estates. The estate of Robert W. Coleman was insolvent, and paid but 50 cents on the dollar of its indebtedness, leaving one-half of the amount due on the note

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**REVERSED.**

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By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is reversed and the cause remanded, with directions to the district court to enter a judgment on the verdict of the jury, finding that plaintiff is entitled to the possession of the property replevied, under his mortgage lien, and that the value of his possession was, at the time of the return of the verdict, \$117.17, with interest at 7 per cent. from the date of the verdict, and that he recover his costs.

REVERSED.

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**REVERSED.**



BLANCHE COLEMAN AND HELEN R. COLEMAN, A MINOR, BY  
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APPEAL from the district court for Gage county:  
CHARLES B. LETTON, JUDGE. *Reversed.*

*E. O. Kretsinger and M. B. Davis, for appellants.*

*Griggs, Rinaker & Bibb and Reavis & Reavis, contra.*

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to the defendant bank as a charge against the estate of Alice M. Coleman. After the note to the defendant bank had been allowed against the estate of Alice M. Coleman, the executor sought, by motion filed at the succeeding term of the county court, to have the order allowing the claim against the estate of Alice M. Coleman set aside. This order was granted in the county court, but on error proceedings instituted in the district court, the order was reversed. The order of the district court, reversing the judgment of the county court, was reviewed on error proceedings in this court, in the case of *McGrew v. State Bank*, 60 Neb. 716, and affirmed.

Afterwards, Blanche M. Coleman and Helen R. Coleman, as sole legatees of Alice Coleman, instituted the present cause of action, for the purpose of restraining the executor of their mother's estate and the defendant bank from applying the funds in the hands of the executor, received from the proceeds of three fraternal benefit policies, to the payment of the claim of the bank against the mother's estate. The petition filed is quite lengthy, the material allegations being that the plaintiffs are the sole legatees and heirs at law of Alice M. Coleman, deceased, and that defendant S. W. McGrew is the executor of her last will and testament; that, at the time of the death of Alice M. Coleman, she was possessed of no separate estate of her own, but was beneficiary in a certificate held by her husband in the Modern Woodmen of America, for \$2,000, in the Ancient Order of United Workmen, for \$2,000, and in the Knights of Pythias, for \$2,000; that each of these companies were fraternal benefit associations, authorized under the laws of the state of Nebraska; that there were no other assets except the proceeds of these policies in the hands of the executor, with which to pay the claim against the estate. The petition also alleged that the claim had been allowed through a conspiracy between the executor and the bank; but, before passing, we might say that there is no proof whatever in the record to sustain this allegation. The de-

defendant executor answered the plaintiffs' petition, admitting each of the allegations except that of a conspiracy. The defendant bank answered, denying the capacity of the plaintiffs to maintain this cause of action, challenging the jurisdiction of the district court, and pleading a former adjudication of the claim against the estate of Alice M. Coleman. On issues thus joined, there was trial to the court, judgment for the defendants, and plaintiffs appeal to this court.

All the facts necessary to an adjudication of this case are either admitted by the pleadings or established without contradiction in the record. These are, that the claim of the defendant bank had been formerly proved against the estate of Alice M. Coleman; that there were no funds of this estate in the hands of the executor, except the proceeds of the three fraternal benefit certificates above set forth; that the executor had finally settled all matters connected with the estate of Alice M. Coleman, except the claim of the defendant bank, and that, when restrained, he was about to pay this claim from the proceeds of one of these fraternal benefit certificates.

The first question, then, to be determined is, were the funds derived from the proceeds of these fraternal benefit certificates assets of the estate of the beneficiary, which are liable for the payment of the debts of the estate, or, are they a trust fund in the hands of the executor for the benefit of the children, heirs at law and legatees of the defendant? If these funds are assets of the estate, and liable for the debts of the deceased, then plaintiffs could not maintain this cause of action, for want of a present interest in the funds; but, if these funds are held in trust by the executor for the plaintiffs, their interest is immediate and the capacity to sue clearly exists. Section 97, chapter 43, Compiled Statutes (Annotated Statutes, 6489), which was originally section 7 of the fraternal beneficiary association act of this state (ch. 47, laws of 1897), provides: "The money or other benefit, charity, relief or aid to be paid, provided or rendered by any society authorized to

do business under this act, shall not be liable to attachment by trustee, garnishee or other process, and shall not be seized, taken, appropriated or applied by any legal or equitable process, or by operation of law, to pay any debt or liability of a certificate holder or of any beneficiary named in a certificate, or of any person who may have any right thereunder." This statute clearly exempts these funds from the debts of the testatrix, and constitutes them a trust fund in the hands of the executor for the benefit of plaintiffs, who are legatees and sole heirs at law of the deceased.

Having arrived at the conclusion that the proceeds of these fraternal benefit certificates are not an asset liable for the debts of the estate, it follows that the plea of *res judicata* relied upon by the appellees is entirely unavailing. The filing of the claim for probate and its allowance amounted to no more than an adjudication of the fact that the estate of Alice M. Coleman was indebted to the defendant bank in the sum found to be due on the note, but there was nothing in this finding that could determine the question of the liability of the funds now in the hands of the executor for the payment of the claim. When the claim was allowed, it became a lien on such funds in the hands of the executor as might legally be appropriated in its discharge, and no other.

The same course of reasoning disposes of the objection of the appellees to the jurisdiction of the district court to hear and determine this cause of action. This objection is based upon the proposition that the county court has sole and exclusive jurisdiction of probate matters, but, if we are correct in the conclusion already reached, the question involved has no connection with the proceedings connected with the probate of the will of the deceased. It is simply an application by the *cestui que trust* to a court of equity for an order restraining the trustee from misappropriation of the trust funds, and the jurisdiction of a court of equity to grant this relief is grounded on the fundamental principles of equity jurisprudence.

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Montague v. Marunda.

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We therefore conclude that the learned district court erred in dismissing plaintiffs' bill, and we recommend that the judgment of the district court be reversed and the cause remanded, with directions to the lower court to render judgment in favor of the plaintiffs, permanently enjoining the executor and the judgment creditors from applying the proceeds of the fraternal benefit certificates in the hands of the executor to the payment of any indebtedness against the estate of the testatrix.

AMES, C., concurs. LETTON, C., not sitting.

By the Court: For the reasons set forth in the above opinion, it is recommended that the judgment of the district court be reversed and the cause remanded.

REVERSED.

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JAMES MONTAGUE V. MINNA MARUNDA.

FILED MAY 5, 1904. No. 13,586.

1. **Jurisdiction: APPEARANCE.** When a party who had made a special appearance in an action or proceeding moves the court for affirmative relief in his own behalf, he thereby makes a general appearance and subjects himself to the jurisdiction of the court.
2. **Mortgage. Foreclosure: DISTRIBUTION OF SURPLUS: NEW PARTIES.** Upon the foreclosure of a mortgage, and a sale and confirmation thereunder, if a surplus remains after the payment of the mortgage debt and costs, the district court, in its equitable jurisdiction, has full power, upon an application being made for a distribution of the surplus, to bring in all parties necessary to a determination of the ownership of the fund, and to try and determine that question.
3. **Title by Prescription: TACKING: PRIVITY.** Privity must be shown between adverse claimants of real estate before the possession of one can be tacked to the possession of the other for the purpose of completing title by prescription; but this privity may exist by grant, devise, purchase or descent, and the adverse possession of an ancestor may be taken advantage of by his heirs, if their possession has been continuous with his, exclusive, and under the

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same claim of right as made by him. In such case, the ouster and disseisin made by the ancestor is continued by the heirs and relates back to his original entry.

ERROR to the district court for Dawes county: WILLIAM H. WESTOVER, JUDGE. *Affirmed.*

*Allen G. Fisher*, for plaintiff in error.

*A. W. Crites and W. W. Wood*, *contra.*

LETTON, C.

This is a proceeding in error to review the action of the district court for Dawes county in distributing a surplus of money arising from a sale under a mortgage foreclosure. The facts are as follows: In 1888, Albert Neuman and Lulu Neuman, his wife, resided upon a certain tract of 160 acres of land in Dawes county, which he had taken as a preemption claim and had made final entry upon. On the 1st day of August, 1888, Neuman and his wife executed a mortgage to W. H. Lanning, trustee, to secure a loan on the premises. After the execution of the mortgage a deed was apparently executed by Lulu Neuman, as grantor, her husband joining with her in the execution of the deed, to one Edward Roberts. This deed was acknowledged by Mrs. Neuman alone before one Peter Hall, a justice of the peace in and for Dawes county. Roberts moved upon the land with his family in March, 1890, and lived there for several years, when he moved to other land adjoining the same, but fenced the Neuman tract, together with his other land, in one inclosure, living within the inclosure. In 1895 Roberts died, but his widow remained in possession of the premises until about the 30th day of March, 1900, when deeds were executed by the heirs of Roberts and his widow to one Ed Marunda, and Marunda took possession under the same. On May 17, 1900, an action was begun in the name of the McKinley-Lanning Loan & Trust Company to foreclose the mortgage. Albert Neuman, Lulu Neuman, Edward

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Roberts, Mrs. Edward Roberts and the unknown heirs of Edward Roberts were made parties defendant.

It is stated in the briefs that Ed Marunda was made a party to this foreclosure action on his own application, and the record shows that he filed an answer, setting up that he had a legal interest in the land in controversy, "said legal interest being an equitable title to the lands described in the plaintiff's petition herein, by a conveyance dated April 3, 1900," and praying that he be permitted to participate in any surplus money remaining from the sale of the lands. No service was had upon Albert Neuman, and no decree taken as to him, but a decree of foreclosure was rendered in the case against the other defendants, ordering the land sold to satisfy the mortgage. The decree of foreclosure makes no finding with reference to the interest of Marunda in the premises. A sale was had under the decree, and Marunda bought the land, but this sale was set aside and a new sale made to James Montague. This sale was confirmed, and a deed ordered and made to Montague, March 13, 1903. After the payment of the mortgage debt, there remained in the hands of the sheriff a surplus of \$610.45, which is in controversy in this case. On the 11th day of January, 1901, a quitclaim deed was executed by Albert Neuman to James Montague for this land, which was filed for record on February 9, 1901, in the office of the county clerk of Dawes county. The consideration recited in this deed was the mortgage indebtedness upon the land and \$5 in hand paid. Ed Marunda died in August, 1902, and his wife, Minna Marunda, was apparently appointed administratrix of the estate.

A motion was afterwards filed by Minna Marunda, asking the court to return to her, as administratrix of Ed. Marunda, the money paid in by Marunda to the sheriff upon his bid for the land, and also praying for an order upon the sheriff, to pay to the clerk of the court the surplus in his hands arising from the sale to Montague. In the meantime Montague had demanded the surplus from the

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sheriff, which demand was refused, and an action was brought by him against the sheriff to recover the same. On the 17th of April, 1903, a hearing was had upon these motions of Minna Marunda. The motions were sustained, and the sheriff ordered to pay to the clerk of the court "the surplus now in his hands, amounting to \$610.45, and to further pay said administratrix the \$900 bid by Ed Marunda at the sale which had been set aside. Montague excepted to these orders. It appears that Minna Marunda, as the widow of Ed Marunda, and one Herman Marunda, a brother of Ed Marunda, had, before this time, filed petitions for a part of the surplus, and the court ordered that the plaintiff and James Montague plead to said applications within 30 days. On July 13, 1903, Montague filed a special appearance, and objections to the jurisdiction of the court, which objections were overruled, and exceptions taken, whereupon he presented to the court a demand for a trial by jury, which was refused and exception taken. Afterwards, he filed an answer, setting up that he was plaintiff in another action pending against the sheriff for the same money; that the court has no jurisdiction; denies the ownership of Ed Marunda or his heirs to the land in question; alleges that the premises were the homestead of the Neumans until the year 1900, and alleges that the facts set forth in the petition do not constitute a cause of action. A reply was filed by the Marundas denying every allegation in this answer. Hearing was had upon the 21st day of July upon the issues thus framed. The court found that the land, at the time of the death of Ed Marunda, belonged to him, and descended to his heirs, subject to the dower estate of his widow, Minna Marunda; ascertained the value of her dower estate, and the shares of the respective petitioners; directed the payment of the same to them, and found generally in favor of the petitioners and against Montague. Exceptions were taken, and a bill of exceptions duly settled and filed, which presents the evidence in support of this proceeding for review.

As to the special appearance and objections to the



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jurisdiction of the court, filed by James Montague on the 13th of July, 1903, it is sufficient to say that, on the 17th day of April, at the time that the hearing was had upon the motions of Minna Marunda, above mentioned, the record shows that an appearance was made by Montague, objecting to the motions; and, further, a motion was made on his own behalf by Montague, seeking to put the powers of the court in motion for his own benefit. By thus appearing and invoking the action of the court, Montague appeared generally in the cause, and could not afterwards be heard to say that his appearance was only special. The objections to jurisdiction were properly overruled. As to the demand for a jury made by Montague, a court of equity had obtained jurisdiction of the parties and of the subject matter, by virtue of the foreclosure proceeding and the subsequent appearance made by Ed Marunda and Montague, and the widow and heirs of Marunda. Confirmation had been had, and the surplus had been brought into court as section 854 of the code provides. All persons who claimed to have any interest in the surplus being before the court, it was within its power, as it was its duty, to retain the cause for all purposes necessary to determine the matters still pending, and to do complete and final justice between the parties. To voluntarily relinquish its jurisdiction over the fund, which was in its possession, would be to surrender one of the most beneficial powers of a court of chancery. The fund being in the hands of the court, it was its duty to ascertain to whom it belonged, and not to relegate the parties to another court for that purpose. No error was committed in retaining the matter of the determination of the ownership of the surplus in its hands, and in refusing the demand for a jury made by Montague. The action was not one of those in which a constitutional right to a jury trial exists. It was not in assumpsit, as was *Yager v. Exchange Nat. Bank*, 52 Neb. 321, cited by plaintiff in error. These considerations also dispose of the assignment that the court erred in directing the sheriff to pay the surplus into court.

Objection is made that the decision is not sustained by sufficient evidence, is contrary to the weight of evidence and is contrary to law; and further objections are made to the court's admitting the documentary evidence of the applicants. As to the deed from Lulu Neuman to Edward Roberts, it appears that, at the time this deed was made, the property was the homestead of Albert Neuman and Lulu Neuman. The deed was not acknowledged by Albert Neuman, and consequently is void, since, in order to convey a homestead in this state the instrument must be executed and acknowledged by both husband and wife. It appears, however, that, immediately upon the execution of the deed, the Neumans moved off from this land to another tract in the vicinity, and possession was taken by Roberts, under claim of title, in March, 1890. Roberts resided thereon with his family for 4 or 5 years. He then bought an adjoining tract, known as the Heckman claim, and moved there, but retained possession of the Neuman tract and fenced it in with 40 acres of the Heckman claim. There is evidence that Roberts cut hay upon this land and cultivated part of it, and that he exercised exclusive control and actual ownership over it during his lifetime, under claim of title. After Roberts' death, his widow and family continued to live upon the 200 acre tract, and, in 1900, deeds were executed by Caroline Roberts, the widow of Edward Roberts, and by all his children and heirs to Ed Marunda. The evidence shows that Marunda took possession of the land under these deeds, and kept the same until his death, and that his widow continued his possession until the spring of 1903. The testimony is conflicting in regard to the condition of the fences around the Neuman and Heckman tracts, but there is sufficient evidence to support the conclusion of the district court that the acts of Roberts, of his widow and heirs after his death, and of Marunda in relation to the occupancy and possession of such land, were sufficient to constitute a notorious, exclusive, adverse and continuous possession, under claim of title, as against all the

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world, during the period from March, 1890, until after the death of Marunda in August, 1902. The void deed from Neuman and wife to Roberts, under which he took possession of the premises, was sufficient to constitute color of title. The statute of limitations began to run as soon as he took possession of the premises under this deed. His subsequent removal to the Heckman 40 acres adjoining this tract did not stop the running of the statute, because he kept continuous adverse possession of the Neuman land, nor did his subsequent death, since his widow and heirs continued to hold under his claim of title. It would seem that the bar of the statute was complete in favor of the heirs of Roberts before the deed to Marunda, but Marunda's possession being derived under the title of Roberts continued the adverse possession. The Roberts' title by prescription had fully ripened into a perfect title before the beginning of the foreclosure suit, and before the execution of the quitclaim deed from Neuman to Montague, under which Montague claims the title to the surplus.

A number of the objections made in the brief of the plaintiff in error are not available to Montague with reference to the title of Ed Marunda, for the reason that, under the testimony, the bar of the statute was complete as against Neuman and Montague, while the title was still in the heirs of Roberts. Since neither Neuman, nor his grantee, Montague, had any title to the land at that time, or at the time Marunda took it, they have no standing in court to complain as to technical defects in the conveyances from Roberts' widow and heirs to Marunda.

It is further urged that, under the authority of *Zweibel v. Myers*, 69 Neb. 294, the possession of the widow and heirs of Roberts can not be tacked to the possession of Roberts, in order to continue the running of the statute of limitations. There is no doubt of the correctness of the rule laid down in the syllabus of that case, that privity must be shown between adverse claimants, before the possession of one can be tacked to the possession of the

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other, for the purpose of completing title by prescription. But the plaintiff in error asserts that, under the holding of the opinion in that case, there can be no privity of possession unless by direct grant or devise. While it is possible that the language of the opinion may be so construed, we do not think that it was intended to hold, in that case, that there can be no privity of possession between ancestor and heirs without a specific grant. It is essential that each occupant must show a derivative title from his predecessor, in order to link his possession with that taken under the original entry, but the possession of the heir is regarded as a continuance of that of the ancestor on account of his privity of blood. Bliss, Code Pleading (3d ed.), sec. 235; *Leonard v. Leonard*, 7 Allen (Mass.), 277; *Rowland v. Williams*, 23 Ore. 515, 32 Pac. 402; *Low v. Schaffer*, 24 Ore. 239, 33 Pac. 678; *Witt v. St. Paul & N. P. R. Co.*, 38 Minn. 122, 35 N. W. 862; *Haynes v. Boardman*, 119 Mass. 414. Where the widow and heirs continue to hold possession acquired by the ancestor under the same claim of title, there is such a privity between them that the ouster and disseisin begun by the ancestor is continued by them, and relates back to his original entry. In the *Zweibel* case, the facts did not show such a continuous possession, under claim of title made by the heirs, and the language must be construed with reference to the facts in that case.

A number of other objections to the decree of the court are urged in the brief of the plaintiff in error, but, under the view which was taken by the trial court of the evidence in the case, with which we agree, they can not be urged by Montague, since, if he had no title to the surplus, he can not complain of the manner of its distribution.

Upon a consideration of the whole record, we are of the opinion that the judgment of the district court was right and that it should be affirmed.

AMES and OLDHAM, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is

**AFFIRMED.**

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DAVID A. STRONG V. ARTHUR EGGERT.

FILED MAY 5, 1904. No. 13,588.

1. **Verdict:** INSTRUCTIONS. A verdict clearly contrary to the instructions of the court should be set aside.
2. ———: EVIDENCE. Evidence examined, and *held* not to sustain the verdict.

ERROR to the district court for Dawes county: WILLIAM H. WESTOVER, JUDGE. *Reversed.*

*Allen G. Fisher*, for plaintiff in error.

*A. W. Crites*, *contra*.

LETTON, C.

This action was originally brought before a justice of the peace in Dawes county by the defendant in error, hereinafter called the plaintiff, who sought to recover from the plaintiff in error, hereinafter called the defendant, the sum of \$170.58, for work and labor which he alleged he performed for the defendant at his request. A trial was had and judgment rendered, an appeal taken to the district court where the cause was tried to a jury, and judgment rendered in favor of the plaintiff for the exact amount claimed by him, to wit, \$170.58. Error proceedings have been prosecuted by the defendant to this court. The defendant is engaged in farming and also to a certain extent in lumbering. In April, 1900, the plaintiff agreed to work for him by the day on his farm, for \$1 a day, no time being specified during which the contract should run. Afterwards, he worked at the saw-mill and lumbering camp of the defendant. It appears

that sometime in August or September, 1900, a verbal agreement was made between the plaintiff and defendant, by which the defendant agreed to convey to the plaintiff a certain tract of land, upon which there was standing a quantity of saw timber, in payment for which the plaintiff was to allow the defendant to retain \$30 then due him for labor, and plaintiff was to cut all timber fit for saw purposes over 12 inches in diameter, then standing upon this tract of land. The evidence shows that this lumber camp was situated some 5 or 6 miles from the farm of the defendant; that when the plaintiff first moved near the sawmill, he moved into a house belonging to one Brennan; that, afterwards, some dispute arising between the parties, this house was torn down, and he was forced to move into a tent which stood near the sawmill, on the tract of land defendant was to convey to him under the oral agreement; and that, afterwards, a house was built by the plaintiff, with lumber furnished him by the defendant. But his house proved to be erected upon land which was outside of the limits of the tract. After the land was surveyed, and it was found that it did not belong to defendant, plaintiff again moved into the tent near the sawmill, where he lived until the fall of 1901, when he left the place.

The principal defense is, that a settlement had been had between the parties; and the defendant further sets up a counterclaim for damages in the sum of \$300, which he claims he suffered by reason of the failure of plaintiff to cut the timber upon the land. Both the settlement and counterclaim were denied by the plaintiff. The defendant brought into court and tendered a deed to the land to plaintiff, to be delivered when he completes the cutting of the timber thereon. The evidence in the case very largely consists of entries in the books of the plaintiff and defendant, together with the explanations of the same, the principal conflict being with regard to the settlement which the defendant claims to have made on November 11, 1900, and as to whether or not the contract for the

purchase of the land was rescinded by defendant. It appears from the testimony that there were about 58,000 feet of saw timber left standing upon the land, at the time the plaintiff left it. The court instructed the jury with reference to the counterclaim: "As to the counterclaim interposed by the defendant, you are instructed that the burden of proof is upon the defendant; and, before he can recover upon the said counterclaim he must satisfy you by a preponderance of the evidence that he sold and delivered possession to the plaintiff of the land heretofore described; that plaintiff, to pay for the same, was to cut the saw timber as set forth in the said counterclaim, and that he at all times has been ready and willing to make a good and valid deed to the said land, when the plaintiff should comply with his part of said contract. If you believe from the evidence that said contract for the sale of the land was made between the parties as alleged in defendant's answer and counterclaim, and that the plaintiff complied with his part of said contract, with the exception of cutting about 58,000 feet of saw timber therefrom, then you are advised that the defendant, upon making a deed to the plaintiff, would be entitled to recover from the plaintiff the value, as shown by the evidence, of cutting said 58,000 feet of logs." The giving of this instruction was excepted to by defendant and is assigned as error. It is urged that this instruction is erroneous, because it omitted the fact that \$30 was to be credited to plaintiff as a first payment on the land, and for various other reasons which it is not necessary to consider, since it is apparent from the verdict that the jury must have found that the defendant failed to prove that he sold and delivered possession of the land, and that he has been ready and willing to make a valid deed to the same when the plaintiff should comply with his part of the contract. There is a sharp conflict in the testimony in regard to this matter. While the parties agree that the timber was to be cut in exchange for the land, yet they disagree as to the time within which this was to be done.

They further disagree as to whether possession of the land was ever actually taken by plaintiff, and further disagree as to whether or not defendant informed plaintiff that he wanted to use the land himself, and rescinded the contract. Upon this conflicting evidence it is apparent from the verdict that the jury found for the plaintiff and against the defendant upon the matter of the counterclaim, and this finding being supported by the evidence will not be disturbed. Hence, the defendant could not have been prejudiced by the omission from this instruction of the matters of which he complains.

It is further assigned that the verdict is not sustained by the evidence and is contrary to the instructions of the court. The jury were properly instructed as to the defense of settlement. It appears from the evidence of both parties that a settlement was had between them upon the 14th day of September, 1900, by which \$30 was credited to plaintiff upon the contract for the sale of the land, and \$10 was found to be still due and owing to him. Accepting the testimony of plaintiff as true in regard to the labor that he performed after the 14th day of September, 1900, and giving him credit for the \$40 still in the hands of Strong, the evidence fails to show that the defendant owes him the amount found due by the verdict. It is apparent that the jury disregarded the settlement, entirely, when they gave the plaintiff a verdict for the full amount claimed.

We doubt very much whether the most expert book-keeper could arrive at any clear or definite conclusion from the defendant's books, as to what credits he was entitled to. After our examination of the defendant's bookkeeping, we do not wonder that the jury entirely disregarded all his entries and his oral testimony, as to payments made by him. Apparently, being unable to arrive at any definite conclusion from his books or his testimony, as to what credit he should have, the jury gave the plaintiff all he asked for, by way of penalty for the defendant's carelessness. Such a verdict can not stand.



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Under the instruction of the court, the jury should have taken into consideration the settlement of September 14, 1900, and given Eggert credit only for what he earned after that time, in addition to the amount then due him. For the failure of the jury to follow the instruction of the court with reference to settlement, and the verdict being in excess of the amount shown by the testimony to be due the plaintiff, the case should be reversed.

AMES and OLDHAM, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is reversed and cause remanded for further proceedings.

REVERSED.

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HUDSON J. WINNETT ET AL., APPELLANTS, V. GEORGE A. ADAMS ET AL., APPELLEES.

FILED MAY 5, 1904. No. 13,386.

1. **Civil and Political Rights.** A civil right is a right accorded to every member of a district, community or nation; a political right is one exercisable in the administration of government.
2. **Primary Election: EQUITY.** A court of equity will not undertake to supervise the acts and management of a political party for the protection of a purely political right.

APPEAL from the district court for Lancaster county:  
EDWARD P. HOLMES, JUDGE. *Affirmed.*

*Hall & Marlay*, for appellants.

*Billingsley & Greene*, contra.

ALBERT, C.

This is a suit for relief by injunction, brought on the 19th day of May, 1902. As the only question in the case is, whether the facts stated in the petition are sufficient

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to constitute grounds for equitable relief, it will be necessary to examine the petition at some length. Omitting the formal parts, and some matters not necessary to an understanding of the case, the petition is as follows:

"The plaintiffs complain of the defendants and say that the defendant George A. Adams is the chairman of the republican county central committee of Lancaster county, and that the said Walter L. Dawson is secretary of said committee, and the defendants Frank A. Graham, Julius Dietrich, George H. Moore, Stanley Wicks, Howard L. Beatty, William Lawlor, James Stevenson, Charles W. Spears, William A. Green, Andrew G. Billmeyer, John S. Bishop, Dominick G. Courtney, William A. Leese, Edwin R. Mockett, Alva L. Pound, James H. Valentine, Victor Seymour, Lee J. Dunn, William J. Blystone, Charles B. Capron, J. H. Amos and Harry G. Abbott are members of such central committee, representing the several precincts of the several wards in the city of Lincoln in said county; that said republican county central committee consists of 20 members from the city of Lincoln and its various precincts, and that there are 32 members of said central committee from the various country precincts in said county; that the country precincts are represented on said central committee as follows:" (Here follows a list of the members from the country precincts.) There being in all 52 members from both city and country precincts of said county central committee. That it requires a majority of said members to adopt any rules or regulations for the governing of primary elections to be held in said county. That said republican county central committee is the governing authority of the republican party within said county and in said several precincts and wards of said city, within the meaning of chapter 27 of the laws of 1899, being sections 125a to 125l, chapter 26, Compiled Statutes, 1901 (Annotated Statutes, 5800-5811).

"That the plaintiffs herein are republicans and qualified electors of the city of Lincoln, Lancaster county, Ne-

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braska, and as such the said Hudson J. Winnett is a candidate for the nomination of the republican party of said county of Lancaster for the office of state senator; and that Orlando W. Webster and William B. Lynch are candidates for the nomination of the republican party of said county for the house of representatives of the Nebraska legislature, and are seeking nomination to said respective offices at the hands of the republican county convention of Lancaster county, Nebraska, and intend, if nominated by said convention, to run for said offices at the general election to be held on the.....day of November, 1902; and as such candidates for said respective offices they desire to submit their names to the qualified republican voters of said several precincts and wards in said city and to submit to the qualified republican voters of said wards, and each precinct thereof, a list of delegates to the regular republican county convention of the republican party, in their respective interests and favorable to their nominations for said respective offices.

"That the regular county convention of said republican party in said county, for the purpose of making nominations to be voted upon at said regular election, is fixed to be held at the city of Lincoln, aforesaid, on Wednesday, the 21st day of May, 1902; and that the regular primary election of said party within said county is set for Tuesday, the 20th day of May, 1902, at which election delegates are to be chosen to take part in said county convention. That such primary election in said several precincts of said several wards in the city of Lincoln will be under the control and supervision of said defendants, respectively, as chairman, secretary and committeemen, as aforesaid; that the said George A. Adams as chairman of said central committee, by and under the rules of practice governing said primary, is to print the ballot to be voted upon at such primary election and have full and complete charge of the preparation and distribution thereof.

"And the plaintiffs further say that the said defendants

and each of them unlawfully, wrongfully and fraudulently, and for the purpose of preventing these plaintiffs from submitting a list of delegates favorable to them and their interests in each of said precincts, and for the purpose of preventing said qualified republican electors in said several precincts from voting upon a proposed list of delegates favorable to each of said plaintiffs herein for said offices for which they are candidates, are threatening, and are about to put in force and apply a pretended rule or regulation, alleged to have been adopted by said central committee, in words and figures following, to wit:

“All ballots shall be printed by the chairman of the county central committee. Nothing shall be placed upon the ballot except the list of delegates selected at the caucus, the names of the candidates, and at the top of the ballot shall be printed “Official Ballot,” and between the names of the delegates sufficient space shall be left in which to write a name or names, other than those printed on the ballot, and at the top of such ballot shall be printed a circle, so that, if desired by the voter, the whole list of delegates may be voted for by one mark; those that neglect to make said mark shall not invalidate such ballot, but the vote will be counted for the delegates unscratched. Said list of delegates shall be printed on plain white paper.

“Provided, that, in such voting precincts as may have two or more candidates contesting for the delegates to the county convention, said candidates may submit their respective tickets to the primary election for settlement, and not be bound by the caucus rule. Said tickets shall be certified to the secretary of the county central committee by the committeemen of the precincts and printed by the chairman of the county central committee, but said agreement between the candidates shall not operate to prevent holding a caucus, if the committeeman sees fit so to do, and the caucus ticket shall also be printed by the chairman of the county central committee. The tickets presented by the candidates shall be printed the same as

in sec. 4. All of said candidates shall file with the secretary of the county central committee a written statement of their agreement as to the tickets to be used at the primary. And the name of the office for which the candidate is running shall be placed thereon; also the name of the nominees selected by the caucus, whether he resides in that precinct or not.'

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"That the said pretended rule is unreasonable, fraudulent and unjust, and beyond the power of said committee to enact, and contrary to the provisions of the statute governing primary elections in this state; and neither under said statute nor by virtue of their general authority did said committee have the power or right to enact and to put in force an unreasonable or unjust rule, designed to prevent the republican voters of said several precincts and wards from expressing their choice, and preventing these plaintiffs and each of them from submitting to such electors a list of delegates in his interests to be voted upon at said primary election. \* \* \*

"The plaintiffs further allege that, while said rules and regulations pretended to have been passed or adopted and promulgated at a meeting of the county central committee, yet, your plaintiffs allege the fact to be that there was in truth and in fact no meeting of the republican county central committee of said county; but the fact is that the city members only of said republican county central committee met together, formulated and pretended to adopt and promulgate said rules and regulations for the government of said primary election; but plaintiffs allege that they did not have a majority present at such meeting of said county central committee, but had in fact only about 20, and that more than 32 members of said county central committee were absent, and knew nothing about, and had nothing whatever to do with said rules and regulations; and that said rules and regulations are void, for the reason that the city members of said committee have no right or authority to formulate, adopt and pass rules and regulations for the government of

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said primary election in the absence of the members of said central committee from all of the various country precincts, said members being 32 in number.

"Plaintiffs further say that the caucuses provided for in said rule, and to which the full and complete authority is pretended to be given to dictate what shall be placed upon the ballot to be voted at such primary election, are in no way subject to the restriction as to qualifications of voters provided by law above referred to; and that the aim and object of said pretended rule is to nullify and evade the provisions of said statute as to qualifications of voters, by leaving the real and substantial selection to the caucus instead of to the real primary election; and that at said caucus meetings no rules as to qualifications of voters will be applied, and if said rule is put in full force and effect it will annul and make a mere form and farce the primary election.

★ "Plaintiffs further allege that, if said defendants are permitted to apply said rule and enforce the same, they will be wholly without remedy; that by and under the pretended rules which said defendants have threatened and are about to enforce, as aforesaid, the said defendants, except the said Dawson and Adams, and each of them, are made the chairman of the several caucuses of the several precincts in which they are committeemen and are given the power to name the secretaries thereof, and that they are threatening, and are about and intend to exercise said power and operate said caucuses in such wise as to wholly prevent these plaintiffs and each of them from bringing before the republican voters any delegates or proposed delegates favorable to their nomination.

"That if said rules and regulations as promulgated are permitted to be put in force by said defendants, as they now contemplate doing, it will result in each of said plaintiffs being prevented, unless they can control the caucuses in their respective wards, from submitting a list of delegates to be voted for at the primary election to the county convention, because, under such rules, no

candidate can submit a list of delegates to be voted for at said primary election unless such candidate can control the caucuses in the various precincts of said city of Lincoln; and that at said caucuses there is no regulation or qualification for voters, any person from any part of the city, whether republican, democrat or populist can attend such caucuses and vote; so that the right to have a list of delegates to the county convention voted for at said primary election depends upon the ability of each candidate to pack and control a caucus; and that said method of selecting delegates under said rules becomes largely a question of brute force, and that said rules and regulations are vicious, unfair and unjust.

"In consideration whereof, and inasmuch as the plaintiffs are without adequate remedy at law, and will suffer great and irreparable injury in case said defendants are permitted to carry out their wrongful and fraudulent scheme, as aforesaid, the plaintiffs pray that a temporary injunction issue, enjoining said defendants and each of them, their agents, servants, employees or representatives, from putting in force or in any manner applying said pretended rule or rules, or any other rule or rules or pretended regulations of any sort, designed to or which will operate to prevent the said plaintiffs and each of them from fairly submitting to the republican voters of said several precincts or any of them at said primary election proposed list of delegates favorable to their nominations and interests, to be voted upon, and enjoining and restraining them from printing or authorizing to use at such primary election in said precincts or any of them any form of ballot which does not contain the list of delegates in each precinct proposed by and favorable to these plaintiffs and each of them, and to be voted for along with such other proposed delegates as may be presented to said defendants, in order that a full, fair and free expression of a preference and choice of the republican voters of said several precincts may be had; that upon the final hearing of this cause, said injunction may be

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made permanent, and for such other and further relief as justice and equity may require."

A general demurrer to the petition was sustained, and the suit dismissed. The plaintiffs appeal.

The doctrine that equity is conversant only with matters of property and the maintenance of civil rights, and will not interpose for the protection of rights which are merely political, is supported by an almost unbroken line of authorities. *Fletcher v. Tuttle*, 151 Ill. 41, 25 L. R. A. 143; *Sheridan v. Colvin*, 78 Ill. 237; *State v. Aloe*, 152 Mo. 466, 47 L. R. A. 393; *Giles v. Harris*, 189 U. S. 475; *In re Sawyer*, 124 U. S. 200; *Green v. Mills*, 69 Fed. 852, 30 L. R. A. 90. In the last case, the authorities in support of this doctrine are reviewed at some length. In *Giles v. Harris* it is said: "The traditional limits of proceedings in equity have not embraced a remedy for political wrongs."

A civil right is "A right accorded to every member of a district, community or nation," while a political right is "A right exercisable in the administration of government." *Anderson's Law Dictionary*, 905. In 2 *Bouvier's Law Dictionary*, 929, it is said: "Political rights consist in the power to participate, directly or indirectly, in the establishment or management of the government. These political rights are fixed by the constitution. Every citizen has the right of voting for public officers, and of being elected; these are the political rights which the humblest citizen possesses. Civil rights are those which have no relation to the establishment, support, or management of the government. These consist in the power of acquiring and enjoying property, of exercising the paternal or marital powers, and the like. It will be observed that every one, unless deprived of them by sentence of civil death, is in the enjoyment of his civil rights, which is not the case with political rights; for an alien, for example, has no political, although in full enjoyment of his civil rights." The rights, for the protection of which the plaintiffs invoke the chancery powers of the court in this case, fall squarely within the definition of political rights.



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Notwithstanding the array of authorities which support it, we should not care to commit ourselves unqualifiedly to the doctrine that a court of equity will not under any circumstances interfere for the protection of political rights. But, we think it is perfectly safe to adopt the doctrine to the extent of holding that a court of equity will not undertake to supervise the acts and management of a political party, for the protection of a purely political right. We do not overlook the fact that primary elections have become the subject of legislative regulation, and it may be conceded that each member of a political party has a right to a voice in such primaries, and to seek nomination for public office at the hands of his party. But, when he is denied these rights, or unreasonably hampered in their exercise, he must look to some other source than a court of equity for redress. To hold otherwise would establish what could not but prove a most mischievous precedent, and would be a long step in the direction of making a court of equity a committee on credentials, and the final arbitrator between contesting delegations in political conventions. The voters themselves are competent to deal with such matters without the guiding hand of the chancellor, and it will make for their independence, self reliance and ability for self government, to permit them to do so. It is true, they may make mistakes, but courts themselves have been known to err.

It is therefore recommended that the decree of the district court be affirmed.

GLANVILLE, C., concurs.

By the Court: For the reasons stated in the foregoing opinion, the decree of the district court is

**AFFIRMED.**

SEDGWICK, J.

It does not appear from the allegations of the peti-

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tion, as quoted in the opinion, that the committee had taken the necessary steps to hold a legal primary election under the statute.

I concur in the conclusion reached but not in the reasoning employed.

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LUSETTA SOLT, ADMINISTRATRIX, ET AL., APPELLANTS, V.  
LEWIS C. ANDERSON, APPELLEE.

FILED MAY 5, 1904. No. 13,508.

1. **Homestead: CONVEYANCE.** The acknowledgment by both husband and wife of an instrument whereby it is sought to convey or incumber a homestead, is an essential step in the due execution of such instrument.
2. **Acknowledgment.** That such instrument was thus acknowledged should appear from the instrument itself in the form of a certificate of the officer before whom the acknowledgment was taken, and, in the absence of such certificate, it is not competent to show by parol that the instrument was in fact acknowledged.

APPEAL from the district court for Hamilton county:  
BENJAMIN F. GOOD, JUDGE. *Affirmed.*

*Hainer & Smith*, for appellants.

*J. M. Day*, *contra*.

ALBERT, C.

Three opinions have already been filed in this case. See 62 Neb. 153, 63 Neb. 734, 67 Neb. 103. The following from the last opinion is sufficient, for present purposes, to show the nature of the suit.

"Lusetta Solt, widow and administratrix of Jacob Solt, brought this suit against Anderson, joining the heirs at law of the intestate, as required by section 335a, chapter 23, Compiled Statutes (Annotated Statutes, 5185), setting up a contract 'entered into' between said Jacob Solt, in his lifetime, and said Anderson, for the sale of certain

land held by Solt, and praying for specific performance thereof."

When the case reached the district court, an amended answer was filed, setting forth that the premises in question, at the time the contract was made, were the family homestead of the plaintiff and her husband, not exceeding \$2,000 in value and less than 160 acres in extent, and that the said contract was not acknowledged by the plaintiff and her husband, or either of them, as required by the homestead act, and is therefore void. It is conceded that the premises were the homestead of the parties at the time the contract was made. The contract was introduced in evidence, and bears no certificate of any officer authorized to take acknowledgments that it was acknowledged, nor does it appear that any such certificate was ever made. It was signed and witnessed before a justice of the peace, and the plaintiff introduced parol evidence to the effect that it was in fact acknowledged. This evidence is contradicted by evidence introduced by the defendants, but the evidence on that point clearly preponderates in favor of the plaintiff. The court found in favor of the defendants and decreed accordingly. The plaintiff appeals.

The only question presented by the record is, whether it is competent to show by parol that an instrument, purporting to convey or incumber a homestead, which bears no certificate of acknowledgment, was in fact acknowledged? If it is, then the decree of the district court is clearly against the weight of evidence and should be reversed.

We think the question should be answered in the negative. Section 12, chapter 73, Compiled Statutes (Annotated Statutes, 10212), provides: "Every officer who shall take the acknowledgment \* \* \* of any deed, shall indorse a certificate thereof, signed by himself, on the deed." Section 46 provides: "The term 'deed,' as used in this chapter, shall be construed to embrace every instrument in writing, by which any real estate or interest

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therein is created, aliened, mortgaged or assigned, or by which the title to any real estate may be affected in law or equity, except last wills, and leases for one year or for a less time." Section 4 of the homestead act (Compiled Statutes, ch. 36; Annotated Statutes, 6203) provides: "The homestead of a married person can not be conveyed or incumbered unless the instrument by which it is conveyed or incumbered is executed and acknowledged by both husband and wife."

The foregoing sections are *in pari materia*, and should be construed together. Section 4 makes the acknowledgment of an instrument affecting the title to the homestead of a married person an essential step in its execution, and unless such step is taken the instrument is void. *Horbach v. Tyrrell*, 48 Neb. 514; *Havemeyer v. Dahn*, 48 Neb. 536; *Linton v. Cooper*, 53 Neb. 400. Section 12 provides that the evidence of such step shall be perpetuated by the certificate of the officer taking the acknowledgment indorsed on the instrument itself. The sections read together show, we think, that it was the intention of the lawmakers that it should appear from the instrument itself, that every step essential to its due execution had been taken. As we have seen, the acknowledgment is an essential step, when the property affected by the instrument is a homestead, and it should therefore appear on the instrument itself; and its omission therefrom, like the omission of any other essential step, renders the instrument invalid; and it can not be supplied by parol.

We do not overlook the cases holding that, as between the parties, an acknowledgment of a conveyance or an instrument affecting the title to real estate is not essential, and that the office of an acknowledgment is to furnish authentic evidence that the instrument has been duly executed, and is entitled to record. *Linton v. Cooper*, 53 Neb. 400; *Fisk v. Osgood*, 58 Neb. 486. But those cases have no application where, as in the case of a homestead, the acknowledgment is an essential step in the execution of the instrument, and neither of them contain

any hint or suggestion of a relaxation of the rule which requires such instruments to show, of themselves, a substantial compliance with all the requirements of the statute.

Because of the peculiar statutory provisions of the different states, it is not easy to find authorities directly in point. Those bearing on the question under consideration are collected in 1 Cyc. p. 616. In *Elliott v. Peirsol*, 1 Pet. (U. S.) \*328, the court said:

"What the law requires to be done, and appear on record, can only be done, and made to appear by the record itself, or an exemplification of it; it is perfectly immaterial, whether there be an acknowledgment or privy examination in form, or not, if there be no record made of the privy examination; for, by the express provisions of the law, it is not the fact of privy examination, only, but the recording of the fact, which makes the deed effectual to pass the estate of a *feme covert*."

In *Lessee of Watson v. Bailey*, 1 Binn. (Pa.) 470, 2 Am. Dec. 462, where the certificate of acknowledgment was defective, parol evidence was offered to supply the omission, and was refused. Yeates, J., who delivered the opinion, said: "Such parol testimony ought not to be received. It leads to great uncertainty and mischiefs in tracing titles to real estates at a distant day." This language was cited with approval by Tilghman, C. J., in *Jourdan v. Jourdan*, 9 S. & R. (Pa.) 268, 11 Am. Dec. 724. To the same effect is *Barnet v. Barnet*, 15 S. & R. (Pa.) 72, 16 Am. Dec. 516; *Louden v. Blythe*, 27 Pa. St. 22, 67 Am. Dec. 442. In *Lindley v. Smith*, 46 Ill. 523, the question arose, whether a defect in the acknowledgment could be explained or supplied by parol evidence. The court said:

"We next come to the consideration of the question, whether the defect in the acknowledgment could be explained by the parol evidence of the justice who certified it? In the case of *Elliott v. Peirsol*, 1 Pet. (U. S.) \*328, the court held that where an acknowledgment failed to state that a *feme covert* was examined separate and apart

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from her husband, as to whether she had executed the deed voluntarily, the defect could not be supplied by parol. At the common law, a *feme covert* could only acknowledge that she transferred her real estate or relinquished her dower by a fine and recovery, and it was, and could only be, by matter of record. The acknowledgments prescribed by statute are intended to take the place of such alienations by record, at least so far as the wife's estate or interest is concerned. And the acknowledgment can not rest partly in writing and partly in parol. When it is remembered, that the deeds of conveyance by married women for the transfer of their real estate or the relinquishment of their dower, do not take effect by delivery as other deeds, but only by being acknowledged in the mode prescribed by the statute, we should hesitate long to permit the officer who made the defective certificate, or some other person, to subsequently supply the defect by oral evidence."

Running through all the cases will be found a strong feeling against the admission of parol evidence to show the due execution of instruments affecting the title to real estate. The present case shows that such feeling is not unreasonable, and that sound considerations of public policy demand that, where an acknowledgment is necessary to give effect to an instrument, the evidence of the fact of such acknowledgment shall be preserved in a permanent form, and not left to the memory of living witnesses. In this instance, after the lapse of ten years, witnesses took the stand and testified to the exact legal phraseology used by the parties in acknowledging the deed; other witnesses were quite clear that no such language was used. Human memory should not be put to such a strain, nor land titles left to rest on so uncertain ground.

It is therefore recommended that the decree of the district court be affirmed.

FAWCETT and GLANVILLE, C.C., concur.

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By the Court: For the reasons stated in the foregoing opinion, the decree of the district court is

AFFIRMED.

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JULIAN S. ALLEN ET AL., APPELLANTS, V. PRISCILLA DUNN  
ET AL., APPELLEES.

FILED MAY 5, 1904. No. 13,474.

1. **Mortgage Foreclosure: NONNEGOTIABLE INSTRUMENTS.** A mortgage securing a note containing a provision that, in case any taxes or assessments shall be levied against the legal holder of the indebtedness on account of the loan within the state in which the mortgaged property is situate, the party of the first part will pay the same, renders the note nonnegotiable.
2. **Note and Mortgage: NOTICE.** A note and mortgage executed at the same time and as parts of the same transaction will be construed together, and the purchaser of the note and mortgage will be charged with knowledge of the contents of the mortgage.
3. **Usury.** Contract for the loan of money as set out in the opinion, *held* to be usurious.
4. ———. There is no authority under the laws of this state for the taking of interest on any loan or forbearance of money for more than one year in advance, for the purpose of obtaining more than the legal rate of interest on the money loaned.
5. **Answer: SUFFICIENCY.** An answer will be liberally construed with a view to upholding it as stating a defense, if its sufficiency is challenged for the first time on appeal.
6. **Evidence.** Evidence examined, and *held* sufficient to sustain the plea of usury.

APPEAL from the district court for Garfield county:  
JAMES N. PAUL, JUDGE. *Affirmed.*

*J. A. Douglas and Guy Laverty, for appellants.*

*C. I. Bragg and E. J. Clements, contra.*

KIRKPATRICK, C.

On the 4th day of September, 1886, Priscilla Dunn procured a loan of \$600 from the American Investment

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Company. A note and mortgage were executed to P. O. Refsil, who seems to have been acting as a trustee for the investment company. A mortgage was given on certain lands in Garfield county to secure the loan. Soon after the note and mortgage were made, they were sold to the trustees of the estate of William S. Pierson. Subsequently, and after the commencement of this foreclosure proceeding, the trustees died, this cause having been revived in the name of the present appellants.

The defense interposed by the appellees is that the contract for the loan was usurious. The trial court so found, and the cause is brought to this court on appeal. The correctness of the judgment of the trial court is challenged upon three grounds: First, that the trial court erred in adjudging the contract usurious; second, that, even if it is usurious, appellees failed to establish this defense by competent evidence; third, that, in any event, the note and mortgage were sold long before maturity, for value, in the usual course of business, and, for that reason, the defense of usury can not be successfully interposed.

Regarding the contention last mentioned, it is disclosed that the mortgage contains a provision in the language following: "It is further agreed that, in case any taxes or assessments shall be levied against the legal holder of this indebtedness on account of this loan, within the state or territory in which the property mortgaged shall be situate, the said party of the first part agrees to pay the same." The note and mortgage were executed on the same day, and are parts of the same transaction, and must be construed together. In the case of *Consterdine v. Moore*, 65 Neb. 296, this court had under consideration a mortgage containing a condition identical in language with that quoted above; and in that case it was expressly held, that such a provision in a mortgage rendered the note which it secured, the note and mortgage being parts of the same contract, nonnegotiable. To the same effect is *Garnett v. Meyers*, 65 Neb. 287. We are content with the doctrine announced in these cases, and upon their



authority the note in controversy is nonnegotiable, and it follows that appellants are in no better position than the payee named in the note.

The first question argued by appellants, and mentioned as first in this opinion, is, whether the transaction as detailed by appellees is, in fact, usurious. The testimony discloses that appellees desired a loan of \$600. There is some uncertainty under the evidence, whether the written application for the loan signed by appellees was for \$600 or for \$690. But, in any event, appellees only desired a loan of \$600, and this is the amount of money received. The note and mortgage which appellees executed were for \$690, and drew interest at the rate of 7 per cent. per annum. The interest paid by appellees was \$48.30 a year, or a total for 5 years of \$241.50. Add to this the \$90 which was added to the face of the note as principal, and which appellees never received, and it will make the interest on the \$600 for 5 years \$331.50; or \$31.50 more than 10 per cent. interest on \$600 for 5 years.

It is contended on behalf of appellants that adding the \$90 to the principal was simply taking 3 per cent. in advance for the 5 years, and that under the statute this is permissible. We do not think that the contention made can be sustained under the statute fixing the rate of interest that may be charged. Section 1, chapter 44, Compiled Statutes (Annotated Statutes, 6725), concerning interest, is in the following language: "Any rate of interest which may be agreed upon, not exceeding ten dollars per year upon one hundred dollars, shall be valid upon any loan or forbearance of money, goods or things in action; which rate of interest so agreed upon may be taken yearly, or for any shorter period, or in advance, if so expressly agreed." This section authorizes the taking of interest annually, or for a shorter period, or in advance, if expressly so agreed; but we fail to find therein any authority for taking interest for 5 years in advance. The \$90 added to the note as principal, together with 7 per cent. on the \$600, which appellees actually received,

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would just equal 10 per cent. on the \$600 loan for the period of 5 years. By the terms of the contract entered into between the parties, the mortgagee each year received \$6.30 upon the \$90 added to the face of the note, and which appellees had never received—more than 10 per cent. This was a mere device to enable the payee to collect more than 10 per cent. interest on the money loaned, and taints the transaction with usury.

We have made a careful examination of the authorities cited by appellants and find none which sustain the doctrine contended for, so that we do not deem an extended discussion of the cases necessary. It is quite clear that under our statute the taking of interest for more than one year in advance is unauthorized, if by such action more than 10 per cent. interest is received.

It is finally contended that, even though usury did in fact exist in the transaction, yet, the burden of establishing that fact is upon the appellees, and that they have failed in the proof. From a careful examination of the entire record, we are of opinion that the finding of the trial court upon that question is clearly right. On the oral argument of the cause, it was contended by appellants that the answer filed in the case is insufficient as a plea of usury. This question is not presented in the briefs, and seems not to have been brought to the attention of the trial court. Under this state of the facts, the answer will be liberally construed, with a view to upholding it as stating a good defense, and, so construed, it is sufficient as a plea of usury. From an examination of the entire record, we are convinced that the judgment of the trial court is right. It is therefore recommended that the judgment be affirmed.

DUFFIE and LETTON, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is

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3. Advancements by a mortgagee made to harvest and market a crop, under an oral agreement with the owner and another mortgagee that they shall be repaid out of the proceeds of the crop before the mortgages, warrant the application of the proceeds to such payment as against a subsequent mortgagee with notice. *Dickenson v. Columbus State Bank.*.... 260

**Collateral Attack.** See **DIVORCE**, 4. **JUDGMENT**, 1, 5.

**Constitutional Law.** See **COURTS**, 2. **INSURANCE**, 1. **STATUTES**, 9. **TAXATION**, 10.

1. Where a part of an act is unconstitutional, the invalid portion has no legal force. *State v. Insurance Co.*..... 335
2. The provision of section 33, chapter 43, Compiled Statutes, 1873, providing for a reciprocal tax on foreign insurance companies, is a valid exercise of legislative power. *State v. Insurance Co.*..... 320
3. The imposition of the reciprocal tax and license fees pro-



**Constitutional Law—Continued.**

- vided by said section 33 is a privilege or license tax imposed as one of the conditions upon which a company is admitted into this state, to engage in business herein. *State v. Insurance Co.*..... 320
4. That the exaction may not be demanded in advance does not change the principle justifying the levying of such tax, and the imposition of such tax in no way violates the provisions of section 1, article IX of the constitution. *State v. Insurance Co.*..... 320
5. That the exactions are required only of those companies having their domicile in other states, the laws of which discriminate against outside companies, is not unreasonable classification, and does not contravene the second clause of said section of the constitution. *State v. Insurance Co.*.... 320
6. The provision of section 38, article I, chapter 77, Compiled Statutes, 1901, exempting insurance companies from all taxation save as therein expressed, is, in so far as it purports to exempt personal property of insurance companies from taxation, a violation of section 1, article IX of the constitution. *State v. Insurance Co.*..... 320
7. A legislative act should not be declared unconstitutional, unless it is so clearly in conflict with some provision of the fundamental law that it can not stand. *State v. Nolan*.... 136
8. The sale of real estate for the payment of delinquent taxes, under the provisions of chapter 75, laws of 1903, does not deprive the owner of his property without due process of law. *Woodrough v. Douglas County*..... 354
9. Repeals by implication are not favored, and a construction of a statute which, in effect, repeals another statute will not be adopted, unless made necessary by the evident intent of the legislature. *Schafer v. Schafer*..... 708
10. The provisions of section 28, chapter 80, Compiled Statutes, relating to distribution of funds to school districts, are not in conflict with section 5, article 8 of our constitution. *State v. Sams*..... 669
11. Where the title to an act states a general subject, coupled with a proposed repeal of laws not within such subject, the act will be held void as to such attempted repeal. *State v. Sams*..... 669
12. Chapter 69, laws 1899, an act to provide for the registration, leasing, selling and management of educational lands, and "to repeal chapter 80, Compiled Statutes of 1897," in terms repeals the chapter referred to, but reenacts certain sections thereof, the subjects of which are not within its title. *Held, That such sections continue in force. State v. Sams*.. 669

Constitutional Law—*Concluded.*

13. The proceeding provided for by chapter 75, laws 1903, is a suit in equity, and the owner of real estate in question therein has no constitutional right to a jury trial. *Woodrough v. Douglas County*..... 354
14. The sale of lands at tax sale for less than the amount of the decree for the taxes due and delinquent, is not a release or commutation of taxes, within the meaning of section 4, article IX of the constitution. *Woodrough v. Douglas County* ..... 354
15. The provisions of chapter 75, laws 1903, are not broader than its title, and are not amendatory of other laws. *Woodrough v. Douglas County*..... 354
16. An act of the legislature will not be declared unconstitutional and void, on the presumption that it will be used as a basis to assert an unjust claim to the property of the state. *Marsh v. Stonebraker*..... 224
17. The legislature is not prohibited by the constitution from granting to a person the right to publish the statutes of this state, and making such statutes *prima facie* evidence of the law, nor from purchasing such number of copies thereof as the legislature may deem necessary for the use of its officers. *Marsh v. Stonebraker*..... 224
18. The amendatory act to section 1020 of the code of 1875, providing for demand of rent and forfeiture at any time after default, held unconstitutional as not properly entitled and not repealing the section sought to be amended, and leaving the common law requirement of demand on the rent day in force until the curative act of 1903. *Godwin v. Harris*..... 59
19. If property susceptible of a beneficial use has been used for an unlawful purpose, a statutory provision subjecting it to summary forfeiture to the state as a penalty or punishment for the wrongful use, without affording the owner opportunity for a hearing, deprives him of his property without due process of law. *McConnell v. McKillip*..... 712
20. Section 3, article III, chapter 31 of the Compiled Statutes, in so far as it provides for the seizure, forfeiture and transfer of title to property without providing for a hearing, held unconstitutional and void. *McConnell v. McKillip*..... 712
21. A civil right is a right accorded to every member of a district, community or nation; a political right is one exercisable in the administration of government. *Winnett v. Adams* ..... 817
22. A court of equity will not undertake to supervise the acts and management of a political party for the protection of a purely political right. *Winnett v. Adams*..... 817

**Contracts.** See LIMITATION OF ACTIONS, 1. REAL ESTATE AGENTS.

1. The consideration sufficient to support a promise may be a detriment suffered by the promisee, as well as a benefit accruing to the promisor. *Henry v. Dussell*..... 691
2. Want of mutuality is no defense, even in an action for specific performance, where the party not bound has performed all of the conditions of the contract. *Dickson v. Stewart* ..... 424
3. In the absence of fraud or imposition, persons of mature years are presumed to have read contracts executed by them, and they can not be varied by parol. *Bradley & Co. v. Basta*..... 169
4. Where plaintiff's claim was for services under an alleged contract of a certain date, under the evidence, held error to instruct the jury that there can be no recovery unless an express agreement on both sides was reached at the time alleged. *Pettis v. Green River Asphalt Co.*..... 513

**Corporations.** See CREDITORS' SUIT, 1.

1. A brewing corporation may become obligated as surety on a liquor bond, where such undertaking is given with a view of renting its real estate and to procure the sale of its products. *Horst v. Lewis*..... 370
2. The state may impose on a foreign corporation, as a condition of doing business in the state, any conditions and restrictions not repugnant to fundamental laws. *State v. Insurance Co.*..... 320
3. Where, by attachment proceedings, without fraud, certain *bona fide* creditors of an insolvent corporation secure the application of all the corporate assets to the payment of their claims, the fact that the directors of the corporation who had guaranteed the payment of such claims requested the creditors to institute the attachment suits does not make them liable in an action at law to the other creditors of the corporation. *Emanuel v. Barnard*..... 756
4. A corporation issued bonds secured by a mortgage in the name of a trustee. Subsequently, a receiver was appointed without notice to the trustee or any of the bondholders, who were not made parties to the proceedings. Held, That the receiver's certificates were not a lien superior to that of the mortgage. *Smiley v. Sioux Beet Syrup Co.*..... 581

**Costs.**

- The necessary expense of settling a bill of exceptions in the district court is taxable as costs incurred in that court.  
*Pettis v. Green River Asphalt Co.*..... 519

**Counties and County Officers.** See **BRIDGES. PLEADING AND PRACTICE, 3.**

1. In allowing salaries fixed by statute, a board of county commissioners act ministerially. *Otoe County v. Stroble*..... 415
2. There is no warrant of law for an allowance of extra salary to the chairman of a board of county commissioners. *Otoe County v. Stroble*..... 415
3. Where the board of county commissioners authorize a warrant to be drawn upon the county treasury without any legal authority, each member of the board is jointly and severally liable to the county for the amount of money so disbursed. *Otoe County v. Stroble*..... 415
4. Section 51, article I, chapter 18, Compiled Statutes, which prohibits county officers from being interested in any county contract is general in its nature and applies to all county officers and to every class of contracts. *Wilson v. Otoe County* ..... 435
5. A contract between a county and one of its officers, whereby such officer undertakes to perform extra-official services, for which the county undertakes to pay him compensation in addition to his salary, is in violation of said section. *Wilson v. Otoe County*..... 435
6. A county is not bound to pay for legal services rendered at the instance of the county attorney, without the previous authorization or subsequent official ratification of the county board. *Card v. Dawes County*..... 788
7. The application of an agricultural society for assistance from the county funds is a claim, and an appeal from its allowance by a taxpayer will lie to reexamine the facts as to the organization and competency of the society. *Sheldon v. Gage County Society of Agriculture*..... 411
8. That county commissioners have made a settlement with the treasurer, by which he is allowed to retain fees in excess of the statutory limit, does not render them liable for the excess of fees retained. Fraud or neglect on their part is necessary to a recovery. *Otoe County v. Dorman*..... 408
9. Under the provisions of sections 29 and 643 of the code, when an officer by misconduct or neglect of duties renders his sureties liable on his official bond, any person who is by law entitled to the benefit of the security may sue upon the bond in his own name. *Barker v. Wheeler*..... 740
10. Since the form of an official bond must be joint and several, a person injured by the misconduct of a public officer may bring a several action upon the officer's bond to recover his damages. *Barker v. Wheeler*..... 740

**Counties and County Officers—Concluded.**

11. A demurrer is not the proper pleading by which to raise a question as to whether or not an action in the county's name by the county attorney was sufficiently authorized. *Otoe County v. Dorman*..... 408

**Courts.** See HOMESTEAD, 1, 2.

1. The courts will not entertain a controversy concerning the title or right of possession of real or personal property, except at the instance of some person or persons having or claiming a right thereto derived from, or recognized by, the laws of this state or of the United States. *Bonacum v. Murphy* ..... 487
2. The state courts are bound by the decisions of the United States supreme court regarding the proper construction of a clause of the federal constitution. *State v. Insurance Co.*, 348
3. An unofficial opinion of a court commissioner is not the opinion of the court. The conclusion reached is approved. The law of the case is to be derived from the judgment of the court. *Hoagland v. Stewart*..... 106

**Creditors' Suit.**

1. A single creditor can not maintain an action at law against a part of the stockholders of an insolvent corporation for a violation of the provisions of section 136, chapter 16 of the Compiled Statutes. Such action should be brought in equity by the receiver, or by a creditor on his own behalf, and for all the other creditors similarly situated, against all the stockholders of the corporation. *Emanuel v. Barnard*.. 756
2. A creditor by the levy of attachment upon land acquires a specific lien sufficient to support a suit to remove a cloud on the title, and in such case the issuance of an execution and return *nulla bona* is not a preliminary prerequisite. *Coulson v. Saltzman*..... 495
3. Where a creditor has acquired a lien by attachment, he may maintain a creditor's bill, though the judgment at law has, during the pendency of such creditor's suit, become dormant. *Coulson v. Saltzman*..... 495

**Criminal Law.** See FALSE PRETENSES. HOMICIDE.

1. The test of responsibility for crime, is the capacity to understand the nature of the act alleged to be criminal, and the ability to distinguish between right and wrong with respect to such act. *Bothwell v. State*..... 747
2. Moral insanity as a criminal defense is not recognized in this state. One who knows abstractly what is right and what is wrong must, at his peril, choose the right and shun the wrong. *Bothwell v. State*..... 747

**Criminal Law—Continued.**

3. The territory defined by the legislative act of March 31, 1887, as Arthur county is attached to, and is within the jurisdiction of, McPherson county, and the district court of that county has jurisdiction of crimes committed within such territory. *Robinson v. State*..... 142
4. Evidence held to sustain the district court's conclusion that a "pool room" was a "room to be used or occupied for gambling within the statutes of the state of Nebraska." *Moores v. State*..... 522
5. In order to predicate error on the fact that the father of a state's witness, while she was testifying, sat near her, it must appear that his presence caused her, in giving her evidence, to deviate from the truth, or color her statements to the prejudice of the accused. *Gould v. State*..... 651
6. Where it is shown that a note and certain letters written by the accused to a child enticed away from her parents by him have been totally destroyed by her, at his request, she may be permitted to give oral evidence of what they contained. *Gould v. State*..... 651
7. Attempts of an accused to escape, may be shown as an inculpatory circumstance. *Kennedy v. State*..... 765
8. Nonexpert witnesses can express opinions as to the sanity of a person only when they have shown sufficient qualifications, and have stated the facts and circumstances upon which their opinion is based. *Bothwell v. State*..... 747
9. Evidence in a prosecution for burglary, held sufficient to sustain the verdict. *Kennedy v. State*..... 765
10. Where one is arrested for the crime of burglary, evidence of what was found in his room at the time of his arrest, together with his conduct and statements, held competent. *Kennedy v. State*..... 765
11. Evidence in a prosecution for kidnapping held sufficient to sustain the verdict. *Gould v. State*..... 651
12. Instructions in a prosecution for murder, held properly given and refused. *Robinson v. State*..... 142
13. The repetition of an instruction is not reversible error, unless its effect is to mislead the jury. *Robinson v. State*.... 142
14. An instruction on the question of insanity, held not erroneous. *Bothwell v. State*..... 747
15. An instruction as to a reasonable doubt, held not erroneous. *Bothwell v. State*..... 747
16. Petition in action for false imprisonment, examined, and held that a general demurrer thereto was properly sustained. *Olmsted v. Edson*..... 17

**Criminal Law—Concluded.**

17. Where a married man is guilty of enticing a girl of 15 years of age away from her parents for an unlawful purpose and in violation of the provisions of section 20 of the criminal code, a sentence of 6 years in the penitentiary is not excessive. *Gould v. State*..... 651
18. Where a prisoner has been found guilty on a criminal charge, and the only error that appears on the record is the failure of the court to pronounce a legal judgment, the supreme court has the power to remand the case to the district court with instructions to render judgment on the verdict in the manner provided by law. *McCormick v. State*..... 505
19. Confinement in the penitentiary under a void sentence is in no sense a part execution of a legal sentence; and, by the rendition and execution of a legal judgment, the accused is not twice punished for the same offense. *McCormick v. State* ..... 505
20. An ineffectual attempt of the district court to render a judgment on a verdict does not deprive that court of the power to pronounce a valid judgment against the accused. *McCormick v. State*..... 505

**Damages.** See ACTION, 1-3. MUNICIPAL CORPORATIONS, 7.

In an action against a county for death, damages are limited to pecuniary compensation for injuries resulting to the next of kin. No damages can be given on account of bereavement or mental suffering. An instruction which does not limit the assessment of damages to the pecuniary injury sustained is erroneous. *Johnson County v. Carmen*..... 682

**Deeds.** See EVIDENCE, 9, 10.

**Demurrer.** See PLEADING AND PRACTICE, 7-10.

**Depositions.**

1. A county judge has the same power in taking depositions that is conferred by law upon a notary public, including authority to commit a witness for contempt. *Olmsted v. Edson* ..... 17.
2. A petition against a county judge to recover damages for false imprisonment, based on such a commitment, must allege facts from which it appears that the officer proceeded without jurisdiction, or that the evidence sought to be elicited was of such a nature as to justify a refusal to testify. *Olmsted v. Edson*..... 17

**Descent and Distribution.** See EXECUTORS AND ADMINISTRATORS. HOMESTEAD.

1. The interest of a vendee in possession of real estate under a contract of sale descends to his heirs. *Cutler v. Mecker*.. 732

**Descent and Distribution—Concluded.**

2. Under the decedent law, a nonresident who claims under a will which has never been probated in this state, is not a necessary party to a suit against the heirs to subject the land to payment of the claims of creditors. *Coulson v. Saltzman* ..... 495
3. Under section 34, chapter 23, Compiled Statutes, 1903, oral testimony is incompetent to prove advancements. *Boden v. Mier*..... 191
4. In the distribution or partition of an estate, a debt due from a distributee, which is barred by the statute of limitations, can not be deducted from the share of such distributee. *Boden v. Mier*..... 191

**Divorce.**

1. When a wife, without cause, refuses to live with her husband, and the evidence shows that she did not assist in or contribute to the accumulation of any of his property, the husband on obtaining a divorce on the ground of desertion, will not be required to pay alimony. *Isaacs v. Isaacs*..... 537
2. The district courts of this state have no jurisdiction of the subject of divorce except such as is given them by the statute. *Aldrich v. Steen*..... 57
3. The residence of one of the parties in the county in which an action for divorce is brought is necessary to the jurisdiction of the court. *Aldrich v. Steen*..... 57
4. A decree of divorce obtained without collusion by a defendant on a cross-bill in a suit begun in a county where neither party resided, but by a resident of the state, whose motion to dismiss the cross-bill for want of jurisdiction was denied, and who contested its allowance at the trial but took no appeal, is not open to collateral attack by his heirs claiming his property. *Aldrich v. Steen*..... 33
5. Sections 1 and 2, chapter 49, laws of 1885, held to apply to the commencement of proceedings in the supreme court, and not to repeal section 602 of the code in its application to proceedings commenced in the district court to vacate a decree of divorce. *Schafer v. Schafer*..... 708
6. The provisions of section 602 of the code authorizing a court to vacate or modify a decree or judgment after the term apply to divorce proceedings. *Schafer v. Schafer*.... 708

**Domicile.**

- The general rule is that the domicile of the husband is the domicile of the wife. *Isaacs v. Isaacs*..... 537



**Dower.** See HOMESTEAD. MORTGAGES, 2.

An unassigned dower interest in land is not the subject of a leasehold contract conveying any interest in the lands.

*Jackson v. O'Rourke*..... 418

**Easements.**

An easement consisting of the right to maintain a mill-pond upon the land of another, does not deprive the owner of the land of any use thereof which does not interfere with the enjoyment of the easement. *Johnson v. Sherman County Irrigation, Water Power and Improvement Co.*..... 452

**Elections.** See CONSTITUTIONAL LAW, 21, 22.

**Elevators.** See TAXATION, 1-4.

**Eminent Domain.**

1. Under the constitution, mere passive acquiescence by a land owner in the taking of his property for a public use, not continued for the statutory period of limitations, is not a waiver of his right to compensation therefor and can not be made so by statute. *Kime v. Cass County*..... 680

2. The owner of land attempted to be taken for a public road may enjoin the use of the same for such purpose until his damages have been paid. *Kime v. Cass County*..... 677

**Equity.** See LANDLORD AND TENANT, 2. TRUSTS, 3.

1. Equity has jurisdiction to supply the omissions and defects of legal procedure, when necessary to the due administration of justice. *Wardell v. Wardell*..... 774

2. Although minors are not bound by contract or estoppel, equity will not aid them to take an unjust advantage of their adversaries. *Tindall v. Peterson*..... 166

**Estoppel.** See MORTGAGES, 7. REFERENCE, 1.

A party who fails to read a release of claims for damages for personal injuries signed by himself is estopped from claiming that the release is not legal and binding upon him according to its terms. *Osborne v. Missouri P. R. Co.*..... 181

**Evidence.** See ACKNOWLEDGMENT. BANKS AND BANKING, 2. CONTRACTS, 3. CRIMINAL LAW, 4-11. DESCENT AND DISTRIBUTION, 3. LIMITATION OF ACTIONS, 2. MORTGAGES, 8. QUIETING TITLE, 3. REFERENCE, 3. TRIAL. TROVER, 3. WITNESSES.

1. Evidence that minor sons of a deceased were required to devote their time to the support of the family and were unable to attend the public schools, held properly admissible in response to evidence that no pecuniary loss had been sustained by those claiming a right to recover for loss of support. *Horst v. Lewis*..... 370

**Evidence—Continued.**

2. Evidence as to the payment of the debts of the deceased from the proceeds of the products raised on the farm, held not erroneously admitted. *Horst v. Lewis*..... 370
3. Expert evidence is permitted where the facts are such that the witness is supposed, from his experience, skill and study, to have peculiar knowledge upon the subject of inquiry. *Horst v. Lewis*..... 370
4. The Carlisle table of mortality is admissible in evidence in determining the probable duration of the life of the deceased. *Horst v. Lewis*..... 370
5. Declarations, to be admissible as a part of the *res gesta*, must accompany and be a part of the transaction in controversy. *Horst v. Lewis*..... 370
6. Where a book contains voluminous accounts, an accountant, who has made an examination of it, may testify as to the result of his computation, but not as to inferences. *Mendel v. Boyd*..... 657
7. Where the question was whether certain drafts had been paid for when issued, an accountant who has examined the books of the bank can not testify as to what they show. *Mendel v. Boyd*..... 657
8. Though the language of a note executed by directors of a corporation imports a personal obligation, it may be shown by parol evidence, on an issue of reformation, that the intention of both the makers and the payee was to execute an instrument binding the corporation. *Western Wheeled Scraper Co. v. McMillen*..... 686
9. Evidence held not to show such total want of understanding as to avoid a deed in the absence of fraud or undue influence. *Aldrich v. Steen*..... 33
10. Evidence held sufficient to avoid, for undue influence, the deeds concerning all his property, of the value of many thousand dollars, made by a frail old man, who had shown symptoms of dementia, to his housekeeper, without consideration. *Aldrich v. Steen*..... 33
11. Under section 339 of the code the entire conversation on the same subject may be inquired into, or one necessary to make the other fully understood. *Pettis v. Green River Asphalt Co.* ..... 513
12. The value of real property can not be shown by proof of independent sales. *Union P. R. Co. v. Stanwood*..... 158
13. When a witness to the value of real estate has testified that he has based his opinion upon sales of other real estate, an offer of evidence of the prices obtained at such sales must

**Evidence—Concluded.**

- include an offer to prove that such prices were, in fact, different from what the witness understood them to be. *Union P. R. Co. v. Stanwood*..... 158
14. It is not within the scope of the authority of a hired manager of a hotel to bind his employer by admissions concerning a trespass after it had been committed. *Clancy v. Barker* ..... 83
15. Evidence *held* to warrant the finding of the trial court that an appeal taken by the defendant had not been determined or disposed of. *Bonacum v. Murphy*..... 463
16. Evidence of the omission of a child from a will *held* insufficient to sustain the findings of the trial court. *Brown v. Brown* ..... 200
17. Evidence in a suit for divorce *held* to fully sustain the findings and judgment of the trial court. *Isaacs v. Isaacs*.. 537
18. Evidence in a creditors' suit *held* sufficient to sustain the finding and decree of the trial court. *Coulson v. Saltsman*.. 495
19. Evidence in a foreclosure *held* sufficient to sustain the judgment of the trial court. *Meinhardt v. Newman*..... 532
20. Evidence in an action to construe a will *held* sufficient to sustain the decree of the district court. *Second United Presbyterian Church v. First United Presbyterian Church*.. 563
21. Evidence in an action for an accounting *held* to sustain trial court's finding of amount due. *Dickenson v. Columbus State Bank*..... 260
22. Evidence *held* sufficient to sustain the plea of usury. *Allen v. Dunn*..... 831
23. Evidence in an action for work and labor *held* sufficient to sustain the verdict. *Trumbull v. Frey*..... 754
24. Evidence in an action for work and labor *held* not to sustain the verdict. *Strong v. Eggert*..... 813
25. In an action on a contract, *held* that the verdict and judgment are sustained by the evidence. *Henry v. Dussell*.... 691

**Exceptions, Bill of.** See JUSTICE OF THE PEACE, 1.

**Executors and Administrators.** See DESCENT AND DISTRIBUTION.

1. An administrator has no authority to lease the lands of his intestate after the payment of the debts and final settlement of the estate. *Jackson v. O'Rorke*..... 418
2. An order of a county court refusing an application to file a claim against an estate, because presented after the expiration of the time allowed for presenting claims, is a final order from which an appeal to the district court will lie. *Ribble v. Furmin*..... 108

**Executors and Administrators—Concluded.**

3. Where notice of the expiration of the time for presenting claims against an estate was published prior to making the order fixing such time, *held*, that claimant is entitled to an order allowing her claim to be filed and directing a hearing thereon. *Ribble v. Furmin*..... 108
4. A judgment of the district court, upon an appeal from an order denying the filing of a claim against an estate, remanding the cause to the county court, with direction to permit the filing of the claim, is not the proper judgment, but a hearing in the district court on such claim should be had. *Ribble v. Furmin*..... 108
5. A homestead of less value than \$2,000 can not be disposed of at administrator's sale, and a license purporting to authorize such a sale is absolutely void. *Tindall v. Peterson*, 160

**Exemptions.** See INSURANCE, 3.

**False Imprisonment.** See CRIMINAL LAW, 16.

**False Pretenses.**

1. To constitute the crime of obtaining money under false pretenses, the pretense or pretenses relied on must relate to a past event or an existing fact. *Cook v. State*..... 243
2. On the trial of one charged with the violation of section 125 of the criminal code, the giving of an instruction that representations as to a future act, with intent to defraud, will render the defendant guilty, is reversible error. *Cook v. State* ..... 243

**Foreclosure.** See MORTGAGES.

**Fraud.** See CHATTEL MORTGAGES, 2. **VENDOR AND PURCHASER, 1.**

The general rule is that, where ordinary prudence would have prevented the deception, an action for fraud will not lie.

*Osborne v. Missouri P. R. Co.*..... 180

**Game.** See CONSTITUTIONAL LAW, 19, 20.

**Gaming.** See MANDAMUS, 7-9.

**Guardian ad Litem.**

The appointment of a guardian *ad litem* is not a mere matter of form, nor are his duties merely perfunctory. *Boden*

*v. Mier*..... 191

**Guardian and Ward.**

1. There is a well defined distinction between the privileges accorded to parents and guardians in their communications with children and wards, with reference to their domestic relations, and that which exists between strangers. *Trumbull v. Trumbull*..... 186

**Guardian and Ward—Concluded.**

2. Where advice is given by a guardian, which leads to a separation by the ward from husband or wife, the presumption is that the advice was given in good faith. *Trumbull v. Trumbull* ..... 186
3. In a suit against a guardian for damages for alienation of affections of a ward, it is a good defense that he advised the ward from honest motives. *Trumbull v. Trumbull*.... 186
4. A guardian may lease the ward's lands for the term of his guardianship, but any excess in such lease will be void at the election of the ward on attaining his majority. *Jackson v. O'Rourke*..... 418

**Highways. See EMINENT DOMAIN.**

1. Act of February 25, laws 1875, page 190, held to have no relation to the protection of users of highways against unconfined hogs. *Heist v. Jacoby*..... 395
2. One permitting young hogs to go at large upon his own premises, so that they wander across the highway and frighten a passer's horse, held not liable for injuries to the passer's equipage and person produced by such fright. *Heist v. Jacoby*..... 395
3. If the public has acquired no right by prescription or dedication to a way across the land of an individual, the court may examine the proceedings by which it was attempted to lay out a highway across the same, to ascertain whether or not the county board had jurisdiction to act, and the lapse of time alone will not supply a jurisdictional defect in the proceedings. *Peterson v. Fisher*..... 238

**Homestead. See EXECUTORS AND ADMINISTRATORS, 5. MORTGAGES, 1.**

1. The county court has jurisdiction to assign dower and homestead. *Tyson v. Tyson*..... 438
2. In order to oust the county court of such jurisdiction, the right of the widow must be disputed by an issue of fact, which the county court is unable to try. *Tyson v. Tyson*... 438
3. In a contest between the widow and the heirs at law as to the extent of her homestead in suburban lands, she is entitled to a homestead not exceeding 160 acres in area and \$2,000 in value. *Tyson v. Tyson*..... 438
4. The acknowledgment by both husband and wife of an instrument to convey or incumber a homestead is necessary. *Solt v. Anderson*..... 82<sup>c</sup>
5. When a husband dies possessed of a tract of land occupied as a homestead, but which exceeds the value of \$2,000, and the homestead can not be set apart from the residue of the tract, the district court has jurisdiction to decree a sale of

**Homestead—Concluded.**

- the whole tract, reserving \$2,000 of the proceeds for the widow and heirs. *Wardell v. Wardell*..... 774
6. Where the homestead of a decedent can not be set apart from the residue of a tract of land, no legal estate passes to the widow and heirs under the homestead act, but in lieu thereof an equitable interest to the value of \$2,000. *Wardell v. Wardell*..... 774
7. A homestead may be composed of contiguous parts of different governmental subdivisions. *Tindall v. Peterson*.... 160

**Homicide.**

1. Where one points a loaded pistol at another, although he has reason to think it is not loaded, he is guilty of an assault; and if the person assaulted is killed thereby, he is guilty of manslaughter. *Ford v. State*..... 246
2. Instructions in case of accidental shooting held properly refused. *Ford v. State*..... 246
3. A defendant in a prosecution for murder is entitled to have the theory of his defense submitted to the jury by proper instructions; but where, by his own theory, he is guilty of manslaughter, his rights are not prejudiced by a failure to give his instructions. *Ford v. State*..... 246
4. Where a defendant, in sport or through wantonness, pointed a pistol at the deceased, and a shot followed which killed him, held, that a sentence of seven years was excessive. *Ford v. State*..... 246
5. Where all of the elements necessary to constitute murder in the first degree are proved, a verdict of guilty will not be set aside because the state did not establish a motive for the commission of the crime. *Robinson v. State*..... 142

**Husband and Wife. See GUARDIAN AND WARD, 1-3.**

1. While antenuptial agreements may essentially alter the interest which either the husband or wife takes in the property of the other, they can not vary the terms of the conjugal relation itself. *Isaacs v. Isaacs*..... 537
2. An antenuptial agreement by a man about to be married that after marriage he will reside in a particular state can not be enforced. *Isaacs v. Isaacs*..... 537
3. The wife is bound to follow her husband when he changes residence, if such change is made in good faith. *Isaacs v. Isaacs* ..... 537
4. When a wife, without just cause, refuses to live with her husband, he is not required to contribute to her support. *Isaacs v. Isaacs*..... 537

**Infants. See EQUITY, 2.**

**Injunction.** See EMINENT DOMAIN, 2. INSURANCE, 4, 5, 8-10. RELIGIOUS SOCIETIES, 2. TRUSTS, 3. WATERS, 2-6.

**Innkeepers.**

1. A hotel keeper impliedly undertakes that a guest shall be treated with due consideration for his comfort and safety. *Clancy v. Barker*..... 83
2. A trespass committed upon a guest in a hotel by a servant of the proprietor is a breach of such implied undertaking, for which the proprietor is liable in damages. *Clancy v. Barker* ..... 83
3. It is the duty of a hotel keeper to protect his guests while in his hotel against the assaults of employees. *Clancy v. Barker* ..... 91

**Instructions.** See APPEAL AND ERROR, 7. CRIMINAL LAW, 12-15. DAMAGES. FALSE PRETENSES, 2. HOMICIDE, 2. PARTNERSHIP, 2. TRIAL.

1. Instructions in a prosecution for kidnapping held to have been properly given. *Gould v. State*..... 651
2. Instructions requested, given and refused in an action on a contract, held not prejudicial. *Henry v. Dussell*..... 691
3. Instructions in an action for damages against a city held to be without prejudice. *City of South Omaha v. Ruthjen*.. 545
4. Instructions in an action for alienation of affections held prejudicial. *Trumbull v. Trumbull*..... 186
5. Instructions in an action for personal injuries held to be erroneous and prejudicial to the defendant. *Cudahy Packing Co. v. Roy*..... 600
6. Instructions in an action for damages for injuries sustained by the flooding of the basement of a storeroom held prejudicial. *McAdams v. City of McCook*..... 789
7. An instruction not warranted by the pleadings or evidence will require a reversal of the judgment. *McAdams v. City of McCook*..... 789

**Insurance.** See CONSTITUTIONAL LAW, 1-6. CORPORATIONS, 2. STATUTES, 9. TAXATION, 5-7.

1. The business of insurance is not interstate commerce. *State v. Insurance Co.*..... 348
2. An action upon a benefit certificate or insurance policy is transitory and not local in its nature. *Perrine v. Knights Templar's & Masons' Life Indemnity Co.*..... 267
3. Under the provision of section 97, chapter 43, Compiled Statutes, the proceeds of a certificate of a fraternal benefit association are not, before payment to the person entitled thereto, liable for any debt of a certificate holder, or of any beneficiary named in such certificate. *Coleman v. McGrew*.. 801

*Insurance—Continued.*

4. When a fraternal beneficial association refuses and neglects to comply with any of the provisions of the statute, it is the duty of the auditor to notify the attorney general in writing, and the duty of the attorney general to immediately commence an action against such society to enjoin the same from carrying on any business. *State v. Bankers Union of the World*..... 622
5. When, in such action, it appears that any of said causes exist, the court must enjoin the defendant from transacting business until such violation complained of shall have been corrected. *State v. Bankers Union of the World*..... 622
6. When such violation complained of shall have been corrected, and costs are paid, it is the duty of the auditor to reinstate such defendant. *State v. Bankers Union of the World* ..... 622
7. A fraternal beneficial association must have a representative form of government. The directors or other officers must be chosen by the members. *State v. Bankers Union of the World*..... 622
8. Diverting the funds of the society from the purposes for which they are contributed is a violation of the statute and will be enjoined. *State v. Bankers Union of the World*.... 622
9. All claims for death losses must be included in the annual reports to the auditor. A failure to make such report as the statute requires is sufficient cause for enjoining the society from transacting business. *State v. Bankers Union of the World*..... 622
10. The books and records of such society must show the true condition of its business and finances, and if they fail to do so, or if the society fails to report to the auditor the details of its business and financial affairs required by the statute, the society will be enjoined from doing business. *State v. Bankers Union of the World*..... 622
11. Such societies are not allowed to take members who are above the age limit, nor without medical examination, and to do this indirectly by the purchase of the business and risks of another similar society, and consolidating such society with itself, is a violation of law. *State v. Bankers Union of the World*..... 622
12. Such a society can not be said to be insolvent when it is reasonably probable that, by its authorized assessments, it can provide sufficient funds to meet its just liabilities. *State v. Bankers Union of the World*..... 622
13. Under the pleadings and evidence, held that it is not a case for the appointment of a receiver and winding up the af-



**Insurance—Concluded.**

fairs of the society; but, to secure a correction of abuses and irregularities, the defendant is enjoined, under section 16, chapter 47 of the laws of 1897, from transacting business until the law is complied with in the matters specified. *State v. Bankers Union of the World*..... 622

**Interest. See JUDGMENT, 4.**

1. Payments are first applied to discharge interest, and if there be a surplus, such surplus is applied to sink the principal. *Dickson v. Stewart*..... 424
2. Where the plaintiff in an action does not pray for interest, none can be recovered. *City of South Omaha v. Ruthjen*.. 545

**Intoxicating Liquors.**

1. Persons engaged in selling intoxicating liquors under license in this state are jointly and severally liable for all damages arising from such traffic, and such liability extends to the sureties upon their bonds. *Horst v. Lewis*..... 365
2. All such persons and sureties may be joined in a single action and, if a part of them do not reside in the county in which the action is brought, summons may be served upon them elsewhere. *Horst v. Lewis*..... 365
3. A brewing corporation may become liable as surety upon a liquor license bond, executed by it to induce the licensee to lease a building from it and deal exclusively in its products. *Horst v. Lewis*..... 365
4. All dealers in intoxicating liquors who contribute to the intoxication of an individual which causes his death, and the sureties on their bonds, may be joined in one action to recover for loss of the means of support by those who have suffered injury by reason of the death of such individual. *Horst v. Lewis*..... 370
5. Under the provisions of section 1, chapter 50, Compiled Statutes, the licensing board, upon an application to grant a liquor license, must pass upon the character and standing of the applicant, and the board is without authority to delegate these functions to another by issuing the license in the name of one shown to be not the real party in interest. *In re Application of Tierney*..... 704
6. A wife, living with her husband on land, the title to which is in the latter and which is occupied by them as a family homestead, is not a freeholder within the meaning of section 25, chapter 50, Compiled Statutes, regulating the sale of intoxicating liquors. *Campbell v. Moran*..... 615

**Judgment.**

1. When a creditor's bill is brought to set aside a cloud upon the title of property seized in an attachment suit against

**Judgment—Concluded.**

- a nonresident debtor, the court will look at the entire record in the attachment case to see whether jurisdiction was obtained therein. If from all the affidavits the essential facts to confer jurisdiction appear, the judgment will not be declared void. *Jones v. Danforth*..... 722
2. A judgment rendered without substituted service on the defendant in an attachment case against a nonresident, whose property has been seized in this state, is merely erroneous and not void. *Jones v. Danforth*..... 722
  3. If service of summons has actually been made upon a defendant and the time to answer has elapsed before judgment, the fact that an error was made in the return day of the summons is merely an irregularity. *Jones v. Danforth*, 722
  4. A public officer who has by mandamus compelled the payment of the principal of his salary can not afterwards recover interest thereon. *Gordon v. City of Omaha*..... 570
  5. When the record affirmatively shows the nonexistence of some fact necessary to the jurisdiction of the court over the subject matter of the action, a judgment pronounced therein will be void and may be collaterally attacked. *Aldrich v. Steen*..... 57
  6. The dismissal of an application made by a nonresident defendant to open a decree under the terms of section 82 of the code for want of notice, when such dismissal is based on defects in the answer tendered, does not bar a new application in which such defects are remedied. *Oakes v. Ziemer* ..... 65
  7. A dismissal bars another on the same grounds as the first, unless it affirmatively appears from the record that such matters were not considered on their merits. *Oakes v. Ziemer* ..... 65
  8. In an action for conversion, a plea of *res judicata* against plaintiff's title is not sustained by proof that plaintiff, who was made defendant in an attachment case, but against whom no judgment was rendered, had moved to discharge the attachment. *Fred Krug Brewing Co. v. Healey*..... 662
  9. A ruling made upon a motion to dissolve an attachment is not *res judicata* against one who is dismissed by the final judgment entered in the action. *Fred Krug Brewing Co. v. Healey*..... 667
  10. Where, upon appeal in equity, the decree is reversed and the cause remanded for further proceedings upon amended pleadings, nothing has become *res judicata*. *Johnson v. Sherman County Irrigation, Water Power and Improvement Co.* ..... 452

**Jurisdiction.** See **APPEARANCE**. **CRIMINAL LAW**, 3. **DIVORCE**, 2, 3.

1. Where jurisdiction has not been obtained by due service of process, a court acquires no jurisdiction over minor defendants by the appointment of a guardian *ad litem*, and the filing of an answer by such guardian. *Boden v. Mier*... 191
2. When a party who has made a special appearance in an action asks for affirmative relief, he thereby makes a general appearance and subjects himself to the jurisdiction of the court. *Montague v. Marunda*..... 805

**Jury.** See **BILLS AND NOTES**, 2. **CONSTITUTIONAL LAW**, 13. **MASTER AND SERVANT**, 4. **SALES**, 1. **TRIAL**, 13.

**Justice of the Peace.**

1. The affidavits upon which a justice of the peace decides an objection to his jurisdiction can not, on error to the district court, be reviewed, unless incorporated in a bill of exceptions. *Zeigler v. Sonner*..... 501
2. Upon error from a judgment of a justice of the peace to the district court, if error does not affirmatively appear in the proceedings, the judgment should be affirmed. *Zeigler v. Sonner* ..... 501

**Kidnapping.** See **CRIMINAL LAW**, 17.

**Landlord and Tenant.**

1. In the absence of a statute providing otherwise, unless such demand is waived by the terms of the lease, a demand of rent on the day it becomes due is necessary to work a forfeiture of the lease for nonpayment. Lease held to contain no waiver of such demand. *Godwin v. Harris*..... 59
2. When a court of equity has taken cognizance of a case involving the right of rival claimants to the possession of leased premises, it has full power to place the party entitled thereto into possession. *Gaffey v. Northwestern Mutual Life Ins. Co.*..... 304

**Liens.** See **CHATTEL MORTGAGES**.

**Life Estates.**

1. A life tenant who pays off an incumbrance is entitled to be reimbursed by the remainderman. Rule for computing amount. *Tindall v. Peterson*..... 166
2. A life tenant who has paid off an incumbrance upon the fee is entitled to reimbursement from the remaindermen. *Tindall v. Peterson*..... 160

**Limitation of Actions.** See **MORTGAGES**, 2, 6. **PLEADING AND PRACTICE**, 4.

1. A part payment operates to revive a contract debt, barred by the statute of limitations, of its own vigor and not as

**Limitation of Actions—Concluded.**

- evidence of an acknowledgment or new promise. *Ebersole v. Omaha Nat. Bank*..... 778
2. Evidence in an action on notes held insufficient to support the defense of the statute of limitations. *Ebersole v. Omaha Nat. Bank*..... 778
3. Where undue influence is alleged and shown to have continued to the grantor's death, the statute of limitations against an action to set aside his deeds will not commence to run until his death as against his heirs. *Aldrich v. Steen*, 33
4. The recording of a fraudulent deed is not of itself sufficient to charge all parties with notice of the fraud. When accompanied with circumstances sufficient to put a person of ordinary intelligence and prudence upon inquiry which, if pursued, would lead to the discovery of the fraud, the statute begins to run from the recording of the deed, but not otherwise. *Jones v. Danforth*..... 722
5. Where, after conveyance of property by sheriff's deed, the premises are leased by the purchaser to the mortgagor, possession of any portion of the property derived by third persons from the tenant will not stop the running of the statute of limitations in favor of the lessor's title. *Johnson v. Sherman County Irrigation, Water Power and Improvement Co.*..... 452

**Liquors.** See INTOXICATING LIQUORS.

**Mandamus.**

1. The levy of a tax under the provisions of sections 1 to 5 inclusive of article VI, chapter 77, Compiled Statutes, with which to satisfy a judgment against a municipality, will not be enforced by a writ of mandamus where such proposed levy is in excess of constitutional or statutory limitations. *State v. Royse*..... 1
2. In an action to compel the levying of a tax to satisfy a judgment against a city, a court will look behind the judgment and ascertain the nature of the indebtedness on which it is based, in order to determine the limit of the tax which may be levied for its satisfaction. *State v. Royse*..... 1
3. Where judgments have been obtained against a city of less than 5,000 population, for hydrant rentals, by a water works company operating under an ordinance and statute limiting a levy of tax for such purposes to a rate not exceeding 7 mills on the dollar valuation, and such tax has been levied, the court will not compel an additional levy for the satisfaction of such judgments. *State v. Royse*..... 1
4. A demurrer to the answer to a writ of mandamus will be

**Mandamus—Concluded.**

- overruled if the writ fails to show refusal or neglect to perform an official duty. *State v. Sams*..... 669
5. It is not error to dismiss the action and render judgment against relator for costs upon overruling a demurrer to a writ of mandamus which fails to show neglect or refusal of official duty, when no offer or request for leave to amend the writ is made. *State v. Sams*..... 669
6. When one, whose term as a public officer has expired, has made full report of the public moneys which came into his hands, but retains some of them under a claim of right, alleged to be unlawful, mandamus is not a proper action by which to litigate the claim. *Maurer v. State*..... 24
7. That one of two relators asking a mandamus admits that his motive in assailing a pool room was the belief that a certain citizen was interested in its profits, is no ground for reversing a judgment in favor of the relators. *Moore v. State* ..... 522
8. Only in a clear case of abuse of discretion will the granting of a mandamus to a city be reversed. *Moore v. State*.... 522
9. Where a number of prosecutions have failed to bring about the closing of a public gambling house, the existence of the remedy by complaint and arrest of the offenders will not prevent a writ of mandamus to require the mayor and chief of police of a metropolitan city to use their summary powers to prevent such open violation of law. *Moore v. State* ..... 522

**Manslaughter. See HOMICIDE, 1-4.****Marriage.**

- Mental weakness or even unsoundness, not proceeding to the extent of inability to contract in ordinary affairs, will not alone avoid a marriage. *Aldrich v. Steen*..... 33

**Master and Servant.**

1. A bell boy in a hotel and the elevator boy in charge of the elevator, both being employed and subject to the directions of the same master, are fellow servants. *Kitchen Bros. Hotel Co. v. Dixon*..... 293
2. Petition held to charge negligence to the acts of a fellow servant. *Kitchen Bros. Hotel Co. v. Dixon*..... 293
3. If a servant's injury is the direct result of his own disobedience of orders given by one in charge of the work in which he is engaged, he is guilty of contributory negligence and is not entitled to recover therefor. *Western Mattress Co. v. Ostergaard*..... 572
4. When there is evidence that an employee disobeyed the

**Master and Servant—Concluded.**

orders of his superior, and that obedience to the order would have avoided the injury of which he complains, the question of whether the orders were given should be submitted to the jury. *Western Mattress Co. v. Ostergaard*.... 572

5. A master is bound to use such care as the circumstances demand to see that appliances furnished his servants are reasonably safe. He is not liable for defects of which he has no notice, unless the exercise of ordinary care would have resulted in notice. *Cudahy Packing Co. v. Roy*..... 600
6. The relation of master and servant does not render the master liable for the torts of the servant, unless connected with his duties as such servant or within the scope of his employment. *Clancy v. Barker*..... 91

**Mortgages. See BILLS AND NOTES, 3, 4.**

1. One who has fraudulently executed and put in currency a mortgage upon his homestead can not, in an action to foreclose the instrument, gain any advantage by his own wrong. *Pittman v. Mann*..... 257
2. A mortgagee obtained a decree of foreclosure in the year 1877, but there was no adjudication of dower. In 1901 a supplemental cross-petition was filed asking that the mortgagor's wife be decreed to pay the balance due on the mortgage, or be barred of her dower right. *Held*, That the attempted proceedings were barred by the statute of limitations. *Du Bois v. Martin*..... 577
3. Where notes are barred by the statute of limitations at the time of the commencement of foreclosure proceedings, a mortgagee is not entitled, under the provisions of section 847 of the code as it existed prior to the legislative act of 1897, to a deficiency judgment, after a sale of the mortgaged property. *Cady v. Usher*..... 236
4. Where a sheriff's deed, made as the result of foreclosure of a mortgage, conveys mill property with the appurtenances, easements used by the mortgagor pass therewith. *Johnson v. Sherman County Irrigation, Water Power and Improvement Co*..... 452
5. Upon the foreclosure of a mortgage and sale thereunder, the district court has power to bring in all parties necessary to a determination of the ownership of the surplus. *Montague v. Marunda*..... 805
6. An action to redeem may be brought at any time before the statutory bar of ten years is complete. *Dickson v. Stewart*, 424
7. A purchaser at a judicial sale of lands offered subject to apparent liens, who makes no attempt to have them adjudicated until after confirmation and conveyance, is es-

**Mortgages—Concluded.**

topped to impeach them. *Omaha Loan & Trust Co. v. City of Omaha*..... 781

8. Where a party acquires title by purchase at a sheriff's sale, in pursuance of a parol agreement that he is to hold the title as security for the money paid, parol evidence is admissible to show the deed to be a mortgage. *Dickson v. Stewart* ..... 424

**Municipal Corporations. See BONDS. MANDAMUS, 1-3, 8.**

1. A levy of a special assessment is not invalidated because the city council, sitting as a board of equalization under the provisions of section 132, chapter 12a, Compiled Statutes, 1893, after meeting in pursuance of notice take a recess, provided, the city clerk or some member of such board is present to receive complaints. *John v. Connell*.... 10
2. Where a board of equalization, in pursuance of published notice, meets at the office of the city clerk, organizes, transacts some business and then takes a recess, subject to the call of the chairman before expiration of the time mentioned in the notice, it will be presumed that the city clerk remained present at his office to receive complaints and give information. *John v. Connell*..... 10
3. A finding by a board of equalization that all real estate on which special assessments are levied are specially benefited, held not so fatally defective as to invalidate the special assessment and render it subject to collateral attack. *John v. Connell*..... 10
4. Section 69, chapter 12 of the laws of 1887, does not authorize the issue of negotiable bonds by cities and villages to aid private parties in the construction of a system of water-works for such city or village. *Village of Grant v. Sherrill*, 219
5. The provisions of subdivision 15, section 69, article I, chapter 14, Compiled Statutes, 1887, empowering cities of less than 5,000 population to levy a tax of not exceeding 7 mills on the dollar valuation, for hydrant rentals or water furnished such city or village under contract, is a limitation on the taxing power to raise revenue to satisfy an indebtedness created for such purposes. *State v. Royse*..... 1
6. When a city makes provision by sewers or drains for carrying off surface water, it may not discontinue the same, when it leaves the lot owner in a worse condition than he would have been if the city had not constructed such drains. *McAdams v. City of McCook*..... 789
7. Damages are not recoverable against a metropolitan city because of delay or neglect of its mayor and council in the performance of a ministerial duty. *Gordon v. City of Omaha*, 570

**Municipal Corporations—Concluded.**

3. The statutes require the mayor and chief of police of a metropolitan city to actively interfere to prevent or stop open violations of law. *Moore v. State*..... 522
9. The legislature may, by statute, confer upon the governor the power to appoint the board of fire and police commissioners for cities of the first class. *State v. Nolan*..... 136

**Murder.** See HOMICIDE, 5.

**Negligence.** See CARRIERS, 4. MASTER AND SERVANT.

**New Trial.** See PLEADING AND PRACTICE, 11.

**Notice.**

The requirement of the statute that notice of the sitting of the board of equalization shall be published in three daily papers is met by the publication of such notice in two daily papers printed in the English language and one printed in the German language, when these are all the daily papers published in the city. *John v. Connell*..... 10

**Parties.** See COURTS, 1. DESCENT AND DISTRIBUTION, 2. MORTGAGES, 5.

Section 50a of the code, which provides for intervention before trial, does not curtail the power of a court to bring other parties before it, when their presence is necessary to a proper determination of the cause. *Brown v. Brown*..... 200

**Partition.**

Where an action in partition involves an accounting it is the duty of the trial court to state the account, so that an appellate court may form a judgment as to whether the conclusion reached is justified by the law and the evidence. *Baldrige v. Coffman*..... 286

**Partnership.**

1. A partner's share of a single transaction may be recovered by an action at law, if all the other partnership dealings are settled. *Dorwart v. Ball*..... 173
2. When plaintiff's evidence tends to establish such a state of facts it is error to direct a verdict for defendant. *Dorwart v. Ball*..... 173

**Petition.** See PLEADING AND PRACTICE.

**Pleading and Practice.** See COUNTIES AND COUNTY OFFICERS, 11. CRIMINAL LAW, 16. MANDAMUS, 4. MASTER AND SERVANT, 2. QUO WARRANTO. TRIAL. VENUE, 2. WATERS, 2-5.

1. The allowance of amendments to an answer is not an abuse of discretion, even though a demurrer to the answer has been overruled, where opportunity is given to produce additional proof, and the amendments are as to material facts



**Filing and Practice—Concluded.**

- of which there is evidence. *Dickenson v. Columbus State Bank* ..... 260
2. An answer will be liberally construed if its sufficiency is challenged for the first time on appeal. *Allen v. Dunn*..... 331
  3. In an action against a county for damages caused by the giving way of a bridge, the petition contained a general statement that the bridge was "out of repair and unsafe." *Held*, That a motion for a more specific statement should be sustained. *Johnson County v. Carmen*..... 682
  4. The filing of an amended petition in an action for conversion against a bailee for sale, *held* not to be the commencement of a new action, so as to permit the statute of limitations to interpose as a bar between the filing of the original petition and the amendment. *Gourlay v. Prokop*.. 607
  5. In an action for conversion, *held* that the amended petition does not state a new and different cause of action from that attempted to be stated in the bill of particulars and the original petition. *Gourlay v. Prokop*..... 612
  6. Petition *held* not sufficient to authorize the court to appoint a receiver for a corporation. *Smiley v. Sioux Beet Syrup Co.* ..... 586
  7. Petition in an action on an indemnifying bond *held* not subject to demurrer upon the ground of improper joinder of causes of action. *Omaha Gas Co. v. City of South Omaha*, 115
  8. Petition in an action to recover a broker's commission *held* not to state facts sufficient to entitle plaintiff to any relief. *Danielson v. Goebel*..... 300
  9. Petition in an action for conversion *held* to state a cause of action. *Fred Krug Brewing Co. v. Healey*..... 662
  10. Petition in an action on a real estate broker's contract *held* not to state a cause of action. *Covey v. Henry*..... 118
  11. Petition for a new trial under the provisions of section 602 *held* to state a cause of action. *Schafer v. Schafer*..... 708
  12. Where the plea of *ultra vires* is interposed by a corporation in its answer, facts not inconsistent with the petition may be pleaded in the reply to show that the corporation was empowered to enter into the contract, the obligation of which is sought to be avoided. *Horst v. Lewis*..... 370
  13. A failure to state a cause of action in the petition can not be cured by averments in the reply. *Covey v. Henry*..... 118
  14. In an action at law, a prayer for equitable relief is of no avail, unless the petition states facts which will authorize the court to grant such relief. *Emanuel v. Barnard*..... 756

Police Judge. See STATUTES, 2.

**Principal and Agent. See AGENCY. REAL ESTATE AGENTS.**

1. An agency is not revoked for all purposes by the death of the principal. *Meinhardt v. Newman*..... 532
2. In order to exempt an agent from liability upon a negotiable note executed by him within the scope of his agency, he must not only name his principal, but he must express that the writing is the act of the principal. *Western Wheeled Scraper Co. v. McMillen*..... 686
3. An agent who, in good faith and without negligence, acts upon his own understanding of faulty or ambiguous instructions, is not liable in damages to his principal, although his interpretation of them may be erroneous. *Falsken v. Falls City State Bank*..... 29

**Process. See INTOXICATING LIQUORS, 2. VENUE, 1.**

1. Section 22, chapter 20, Compiled Statutes, does not authorize the county court to order personal service on a nonresident minor, no affidavit that service can not be made in this state being on file. *Boden v. Mier*..... 191
2. Personal service outside the state, in pursuance of section 81 of the code, is a nullity, in the absence of an affidavit for service by publication. *Boden v. Mier*..... 191

**Quieting Title.**

1. In a suit to quiet title, plaintiff showed adverse possession for 10 years. Held, That plaintiff was entitled to a decree. *City of South Omaha v. Meehan*..... 230
2. Where one goes upon land as a mere intruder, he can acquire title by adverse possession only to so much of the land as he actually occupies and uses for the period prescribed by statute. *City of South Omaha v. Meehan*..... 230
3. Evidence in an action to quiet title held sufficient to sustain a decree for plaintiff to so much of the land as she is shown to have used and occupied. *City of South Omaha v. Meehan*, 230

**Quo Warranto.**

- An answer in quo warranto, which alleges that respondents are holding office by lawful appointment, under the provisions of a legislative act, and which sets forth the facts in relation thereto, is sufficient to put the validity of such act in issue. *State v. Nolan*..... 136

**Rape. See CRIMINAL LAW, 1, 2.****Real Estate Agents.**

1. A verbal contract with an agent to sell land for the owner or to obtain a purchaser therefor is void. *Covey v. Henry*.. 118
2. Services as a real estate broker rendered for the owner of the land, without a written contract, can not be

**Real Estate Agents—Concluded.**

recovered for, as such, upon a *quantum meruit*. *Blair v. Austin* ..... 401

3. Under the provisions of section 74, chapter 73, Compiled Statutes, 1901, a contract for the sale of land between the owner thereof and an agent must be signed by the owner and broker, must contain a description of the land, and set forth the amount of compensation the agent is to receive for negotiating a sale, or it will be void and furnish no basis for recovery. *Danielson v. Goebel*..... 300

**Receivers. See CORPORATIONS, 4. INSURANCE, 13.**

The appointment of a receiver in an equitable action is an ancillary remedy and incidental to the main object or purpose of the suit. *Smiley v. Sioux Beet Syrup Co.*..... 586

**Reference.**

1. Where parties consent that the report of a referee shall be submitted to the court for determination on the merits, they are precluded from assigning error by the court in substituting therefor the findings of the court. *Hodges v. Graham* ..... 125
2. In such case this court will only consider the correctness of the findings and judgment of the district court. *Hodges v. Graham*..... 125
3. Evidence held to sustain the findings and judgment of the district court. *Hodges v. Graham*..... 125

**Rehearing.**

On rehearing, former judgment entered in this court vacated, and judgment rendered by the district court affirmed. *Smith v. Clay County*..... 614

**Religious Societies.**

1. The courts will not review judgments of the governing authorities of a religious organization with reference to its internal affairs, but they will inquire whether a church tribunal, which undertakes to expel a member, has been organized in conformity with the constitution of the church, and whether a member of such tribunal is disqualified from sitting as a judge in the case. *Bonacum v. Murphy*..... 463
2. Where an appeal has been taken by an accused party to an appellate church tribunal, the civil courts have jurisdiction to enjoin the enforcement of a sentence pronounced against the accused until the appellate ecclesiastical tribunal has disposed of the appeal. *Bonacum v. Murphy*..... 463
3. Where the district court has enjoined the enforcement of a decree of an ecclesiastical court, until an appeal has been determined by the appellate ecclesiastical court, the injunc-

**Religious Societies—Concluded.**

tion must be obeyed until the appeal has been disposed of.

*Bonacum v. Murphy*..... 463

4. The courts of this state will not review the process or proceedings of church tribunals for the purpose of deciding whether they are regular or within their ecclesiastical jurisdiction, nor will they attempt to decide upon the membership or spiritual status of persons belonging or claiming to belong to religious societies. *Bonacum v. Murphy*..... 487

**Repeal.** See STATUTES, §. 2.

**Replevin.**

Where the jury return a verdict finding the right of property replevied and the right of possession in plaintiff, and the value of this right \$117.17, the amount due on a mortgage, and a special finding that the value of the property is \$160, held, that such verdict and special finding are sufficient to sustain a judgment that plaintiff is entitled to the possession of the property, and that the value of his special property in the goods replevied is \$117.17. *Mueller v. Parcel*... 795

**Res Judicata.** See JUDGMENT, 6-10.

**Review.** See APPEAL AND ERROR.

**Riparian Rights.** See ACCRETIONS. WATERS, 1-6.

**Sales.**

1. The purchaser of personal property, under an implied warranty, has a reasonable time within which to determine whether it is as warranted, and such question is ordinarily one for the jury. *Von Dohren v. John Deere Plow Co.*..... 276
2. After he has made the test, and the seller refuses to make any changes, the purchaser must at once return it, or his right to do so will be lost. *Von Dohren v. John Deere Plow Co.* ..... 276
3. Where the purchaser of a corn sheller continues to use the machine, after such refusal by the seller, and keeps the machine for twenty-four days before offering to return it, it will be held, as a matter of law, that he has elected to affirm the contract as made. *Von Dohren v. John Deere Plow Co.*..... 276

**Specific Performance.** See CONTRACTS, 2.

**Statutes.** See CONSTITUTIONAL LAW. TAXATION.

1. The several provisions of a legislative act should be construed together; and, if there is a conflict in them, general expressions must give way to special provisions. *State v. Nolan*..... 136

## Statutes—Continued.

2. That part of the charter of South Omaha, providing for the election and defining the jurisdiction of the police judge, is separable from the rest of the act, and may be rejected without affecting the validity of the charter. *State v. Nolan*, 136
3. Where a later statute contains matter so repugnant to an earlier one that both can not stand, the provisions of the earlier law will be deemed to have been repealed by implication by the later act. *State v. Insurance Co.*..... 320
4. When the legislature in the later act refers especially to a former act, and excepts from the operation of the last act a portion of the former, the inference is warrantable that there was an intention to repeal by implication repugnant provisions of the earlier statute not embraced within the terms of the exception clause. *State v. Insurance Co.*..... 320
5. Where the words of a statute are specific and unambiguous, the meaning which the words import must be held conclusively presumed to be the meaning which the legislature intended. *State v. Insurance Co.*..... 320
6. A statute repugnant in some of its features to some constitutional provision will yield only to the extent of the repugnancy and no further. *State v. Insurance Co.*..... 320
7. Where the act eliminating the unconstitutional feature is complete and capable of enforcement, it will be held valid and enforceable, except where the invalid portion was manifestly an inducement to the passage of the remainder. *State v. Insurance Co.*..... 320
8. Section 38, chapter 77 of the revenue act of 1879, as amended in 1887, being repugnant and inconsistent with the reciprocal tax feature of section 33, chapter 43, passed in 1873, to the extent of such repugnancy and inconsistency, repeals the latter mentioned section by implication. *State v. Insurance Co.*..... 320
9. That part of the revenue act (Compiled Statutes 1901, ch. 77, art. I, sec. 38), providing "Insurance companies shall be subject to no other tax, fees, or licenses under the laws of this state, except taxes on real estate and the fees imposed by section 32 of an act regulating insurance companies, passed February 25, 1873," being unconstitutional, can not operate as a repeal by implication of the provisions of section 33, chapter 43, Compiled Statutes, or any portion thereof. *State v. Insurance Co.*.....335, 341
10. Where general and special provisions of a statute come in conflict, the general law yields to the special; and a special law will not be repealed by general provisions, unless by express words or by necessary implication. *State v. Nolan*.. 136

**Statutes—Concluded.**

11. Statutes *in pari materia* should be construed together and, if possible, effect given to all of their provisions. *State v. Royse*..... 1
12. Chapter 124 of the laws of 1903 does not vest ownership of the statutes therein mentioned in the officers to whom said statutes are to be delivered by the secretary of state. *Marsh v. Stonebraker*..... 224
13. The sections of statutes which require the giving, form and conditions of official bonds, and in whose names actions are to be brought, are in *pari materia* and must be construed together. *Barker v. Wheeler*..... 740

**Taxation. See CONSTITUTIONAL LAW, 1-6. MUNICIPAL CORPORATIONS, 1-3.**

1. An elevator is a storehouse within the meaning of section 39, article I, chapter 77, Compiled Statutes, 1899. *Adams County v. Kansas City & O. R. Co.*..... 549
2. The phrase "outside of said right of way," in the proviso to said section qualifies only the word "property" immediately preceding it, and not the specific terms used in the enumeration of other classes of property therein. *Adams County v. Kansas City & O. R. Co.*..... 549
3. By virtue of such proviso, elevators situate on the right of way of a railroad are subject to assessment by the local authorities, and not by the state board. *Adams County v. Kansas City & O. R. Co.*..... 549
4. The owner of such elevators can not escape local assessment and taxes thereon by voluntarily listing and returning them for taxation to the auditor of public accounts. *Adams County v. Kansas City & O. R. Co.*..... 549
5. That a less reserve fund is required of domestic insurance companies than is required of companies doing business in the state of Pennsylvania, does not militate against the enforcement of the provisions of the reciprocal tax law on companies organized under the laws of Pennsylvania, and doing business in this state. *State v. Insurance Co.*..... 335
6. The provisions of section 33, chapter 43, Compiled Statutes, for a reciprocal tax on insurance companies organized under the laws of other states, whose laws discriminate against insurance companies organized under the laws of the state of Nebraska, apply and become operative from the time of the enactment of such laws by such other states, whether any company of this state shall have established agencies there or not. *State v. Insurance Co.*..... 335
7. The act mentioned is in force and effect, and requires a

**Taxation—Concluded.**

- foreign insurance company doing business in this state to pay the same license fees, etc., required by the laws of the foreign state of companies of this state doing business therein. *State v. Insurance Co.*..... 335
8. Lands purchased at a tax sale by the county, under the provisions of chapter 75, laws 1903, are held in trust for the political subdivisions entitled to any portion of such delinquent taxes. Such lands are not acquired by escheat or forfeiture, and do not belong to the permanent school fund. *Woodrough v. Douglas County*..... 354
9. The remedy provided for in chapter 75, laws 1903, is declared by the act itself to be cumulative. *Woodrough v. Douglas County*..... 354
10. The scavenger act, chapter 75, laws 1903, is a constitutional exercise of legislative power. *Woodrough v. Douglas County*, 354
11. The provisions of chapter 75, laws 1903, do not delegate legislative authority. *Woodrough v. Douglas County*..... 354

**Tenancy in Common.**

- A lease by one tenant in common of an entire estate is void as to the interest of his cotenants. *Jackson v. O'Rorke*..... 418

**Torts.**

- One is not liable in tort for procuring or inducing others to pursue a clear legal right, although such action may result to his advantage. *Emanuel v. Barnard*..... 756

**Trade Marks and Trade Names.**

- To entitle a party to an injunction restraining another from the use of a trade name, he must show his adoption of the name at a time prior to that of his adversary, and that it was not in general use. *Chadron Opera House Co. v. Loomer*, 785

**Trial. See APPEAL AND ERROR. BILLS AND NOTES, 2. MASTER AND SERVANT, 4.**

1. Whether or not, after argument by counsel for plaintiff to the jury, the defense can cut off further argument by waiving argument on his own behalf is a matter within the sound discretion of the trial court. *Henry v. Dussell*..... 691
2. In an action on a contract, if issues of illegality of consideration and duress are properly submitted to the jury, upon which their verdict is adverse to defendant, it is not error prejudicial to the defendant that the court instructs the jury incorrectly as to what constitutes a valid consideration for the contract. *Henry v. Dussell*..... 691
3. An instruction which contains an inaccurate statement of the law will not work a reversal of the judgment, if the instruction could not have misled the jury. *Henry v. Dussell*, 691

**Trial—Concluded.**

4. When a request is made for a proper instruction, the court should give the instruction requested or substitute another in its stead which embodies the same principle. *Western Mattress Co. v. Ostergaard*..... 575
5. When an allegation of negligence is unsupported by any competent testimony, it should not be given in an instruction to the jury. *Western Mattress Co. v. Ostergaard*.... 575
6. An instruction which is applicable neither to the issues nor to the evidence is prejudicially erroneous. *Chicago, B. & Q. R. Co. v. Jamison*..... 252
7. A party entitled to a particular instruction waives his right by omitting to ask for such instruction. *Union P. R. Co. v. Stanwood*..... 150
8. That a witness to values testifies on cross-examination that he took into consideration matters not proper for that purpose, does not entitle a party to have the entire testimony of the witness upon that subject withdrawn from the jury. *Union P. R. Co. v. Stanwood*..... 150
9. The burden of sustaining the affirmative of an issue does not shift during the progress of the trial. *Rapp v. Sarpy County* ..... 382, 385
10. Paragraphs of a petition, which have been struck out on motion, should not be submitted to the inspection of a jury. *Trumbull v. Trumbull*..... 188
11. When necessary to a proper determination of the cause, it is not error to permit an amendment to a pleading after trial, and reopen the case for a trial of the issues tendered by such amendment. *Brown v. Brown*..... 200
12. The supplying of missing records is a matter resting in the sound discretion of a court. *Sheldon v. Gage County Society of Agriculture*..... 411
13. In a hearing upon an appeal from an order denying the filing of a claim against an estate neither party is entitled to a jury trial. *Ribble v. Furmin*..... 108
14. Where, in an action on a contract, the defendant pleads illegality of consideration and duress, upon a return of a finding as to the two defenses adverse to the defendant, it is proper for the court to instruct the jury to find for the plaintiff. *Henry v. Dussell*..... 691
15. When the evidence is not sufficient to warrant a verdict for plaintiff, the court should direct a verdict for defendant. *Sattler v. Chicago, R. I. & P. R. Co.*..... 213



**Trover.**

1. One who has possession of personal property, claiming a lien thereon, may maintain an action for conversion against one who wrongfully attaches the property. *Fred Krug Brewing Co. v. Healey*..... 667
2. In an action for conversion where defendants justify under an order of sale of attached property upon judgment against plaintiff's vendor, they must show a valid judgment in the attachment case. *Fred Krug Brewing Co. v. Healey*..... 662
3. In an action for conversion a motion to strike out certain evidence of proceedings in an attachment case, held properly sustained. *Fred Krug Brewing Co. v. Healey*..... 662

**Trusts.**

1. One who purchases land at a foreclosure sale for the benefit of the owner of the equity of redemption, can not set up the statute of frauds against the party for whom he purchased; the law will hold him to be a trustee for the owner. *Dickson v. Stewart*..... 424
2. Where, by mutual consent, an equitable interest in land has been treated as real estate of which a decedent died seized, and dower therein has been assigned to the widow, a deed issued to her in her own name upon her payment of the balance due under a contract, creates no new right in her as against the heirs; the title inures to their benefit and, in equity, she holds the legal title only as trustee for them. *Outler v. Meeker*..... 732
3. A court of equity has jurisdiction to enjoin a trustee from the misappropriation of trust funds at the suit of a *cestui que trust*. *Coleman v. McGrew*..... 801

**Usury.**

1. Contract for the loan of money as set out in the opinion, held to be usurious. *Allen v. Dunn*..... 831
2. There is no authority for taking interest on any loan of money for more than one year in advance, for the purpose of obtaining more than the legal rate of interest on the money loaned. *Allen v. Dunn*..... 831

**Vendor and Purchaser.**

1. Where fraudulent representations are based on special knowledge of the vendor, and are believed by the vendee, and acted upon by him to his injury, they amount to actionable fraud. *McKibbin v. Day*..... 280
2. Where a vendee has an opportunity for inspection, representations as to the value of the property are regarded as mere expressions of opinion. *McKibbin v. Day*..... 280

**Venue.**

1. Where a resident of the county where a personal action is brought is joined with a resident of another county, to authorize service upon the latter in the county of his residence there must be a right to recover against the defendants jointly. *McKibbin v. Day*..... 280
2. Where the allegations of the petition are such as to include both a joint and several liability, the jurisdiction of the court as to a nonresident of the county on his several liability is sufficiently challenged by a plea to the jurisdiction. *McKibbin v. Day*..... 280

**Verdict.** See **APPEAL AND ERROR**, 17-20. **TRIAL**, 14, 15.

**Waters.** See **ACTION**, 3.

1. A riparian's right to the use of the flow of a stream passing through or by his land, is a right inseparably annexed to the soil; such right is a property right. *Oline v. Stock*.... 70
2. A riparian proprietor, whose use of a stream for water power is impaired by subsequent appropriations, is not required in an action to enjoin such appropriations, to set up specifically what rights are claimed by the appropriators severally or jointly. *Oline v. Stock*..... 70
3. It is not a fatal objection to a petition for injunction against a large number of defendants taking water from a stream to the injury of plaintiff's mill, without compensation, that it asks no other specific relief than the writ. *Oline v. Stock*, 70
4. In an action by a lower riparian owner to enjoin irrigation corporations and others from diverting water from a stream to the injury of his mill, a petition does not state a cause of action without alleging facts showing that such appropriation and use of water by defendants is unlawful. *Oline v. Stock*..... 79
5. The allegations of the petition being consistent with the lawful use of the water by the defendants, they will be so construed as against the pleader. *Oline v. Stock*..... 79
6. Parties who have appropriated water for irrigation purposes pursuant to law, and continued the use of water under such appropriation for more than seven years, can not be enjoined from the continued use of such right by a lower riparian owner whose mill privilege may be injured thereby; his remedy is an action for damages. *Oline v. Stock* ..... 79
7. If one owning land traversed by a stream sells a portion thereof, and gives by parol the right to overflow the remainder by erecting a dam on the land conveyed, the parol

**Waters—Concluded.**

- agreement becomes enforceable. *Johnson v. Sherman County Irrigation, Water Power and Improvement Co.*..... 452
8. The erection of the dam and a mill is a sufficient consideration therefor. *Johnson v. Sherman County Irrigation, Water Power and Improvement Co.*..... 452
9. Where a mill is erected and a water-power obtained by the aid and cooperation of adjoining landowners, any right of flowage over their premises of water for the mill becomes appurtenant thereto. *Johnson v. Sherman County Irrigation, Water Power and Improvement Co.*..... 452

**Wills.**

1. The mere misnomer of a legatee or devisee does not render a gift void, if, from the context of the will or proof dehors the instrument, it can be ascertained who was actually intended. *Second United Presbyterian Church v. First United Presbyterian Church.*..... 563
2. Where one claiming as devisee under a will is not designated therein by his proper name, he may show that he is also known by the name used in the will to designate the devisee, although the name of another claimant exactly corresponds to the name thus used. *Second United Presbyterian Church v. First United Presbyterian Church.*..... 563
3. In such case there arises a latent ambiguity, which may be removed by evidence of circumstances tending to show which of the two claimants the testator intended as the object of his bounty. *Second United Presbyterian Church v. First United Presbyterian Church.*..... 563
4. Under section 149, chapter 23, Compiled Statutes, held, (1) that parol evidence is admissible to show whether the omission of a child from a will was intentional; (2) that the burden of proof is on the pretermitted child to show that the omission was unintentional. *Brown v. Brown.*.... 200

**Witnesses. See CRIMINAL LAW, 8.**

1. Section 329 of the code allows evidence of an interested party against the representative of a deceased person as to transactions testified to by the other party's witness. *Dickenson v. Columbus State Bank.*..... 260
2. Where a party representing a deceased person has introduced evidence of certain payments made to the other party, that party may show to what the payments were applied and that it was with the deceased's assent. *Dickenson v. Columbus State Bank.*..... 260
3. Witnesses as to value of property alleged to have been damaged by grading a street held to be competent. *City of South Omaha v. Ruthjen.*..... 545

**Work and Labor. See EVIDENCE, 23.**

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